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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 SECURITIES AND EXCHANGE
13 COMMISSION,

14 Plaintiff,

15 v.

16 PETER L. JENSEN AND THOMAS C.
TEKULVE, JR.,

17 Defendants.
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Case No. CV 11-05316 R (AGRx)

**[PROPOSED] STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW BY
PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AGAINST
DEFENDANT THOMAS C.
TEKULVE, JR., AND FOR
PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANT PETER L.
JENSEN**

Date: August 20, 2012
Time: 10:00 a.m.
Place: Courtroom 8
(Honorable Manuel L. Real)

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I. INTRODUCTION

Plaintiff Securities and Exchange Commission (“Commission”) files this Statement of Uncontroverted Facts and Conclusions of Law in Support of its Motion for Summary Judgment Against Defendant Thomas C. Tekulve, Jr., And for Partial Summary Judgment Against Defendant Peter L. Jensen pursuant to Fed. R. Civ. P. 56(c)(1) and Local Rule 56-1.

II. STATEMENT OF UNCONTROVERTED FACTS

A. The Defendants And Their Roles As Control Persons

1. Peter L. Jensen

a) Jensen’s Background, Including As An Officer Of Public Companies

1. **Peter L. Jensen (“Jensen”)** was the founder, chief executive officer (“CEO”) and chairman of the board of Basin Water, Inc. (“Basin”) from December 1999 until February 19, 2008, when he resigned as CEO. [Exhibit (“Ex.”) 1 (Complaint) ¶ 6; Ex. 2 (Jensen Answer) ¶ 6¹] Jensen continued to be a member of the board of directors, however, until March 11, 2008. [Ex. 1 (Complaint) ¶ 6; Ex. 2 (Jensen Answer) ¶ 6]

2. Prior to founding Basin, Jensen held officer and/or director positions with three other public companies: first, Jensen was president and member of the board of directors of another public company, Yuba Natural Resources, from 1983-1990, and was also its CEO and chairman from 1989-90; second, he was on the board of directors of a related successor public company, Yuba West Gold, from 1990-92; and third, he was CEO of Western Water from about 1992 to 1997, and its chairman from about 1992 until 1999. [Ex. 5 (Jensen Deposition (“Depo.”)) 17:10-20:17.]

3. Jensen is presently the CEO of Empire Water Company, a private company that has ownership of a water canal and water assets in Riverside and San

¹ All references to exhibits are to exhibits to the accompanying Declaration of Roberto A. Tercero, unless otherwise stated.

Bernardino Counties. [Ex. 5 (Jensen Depo.) 14:21-15:5.] Jensen received a masters' degree in Chemical Engineering from the Massachusetts Institute of Technology in 1974. Jensen resides in San Diego, California. [Ex. 1 (Complaint) ¶ 6; Ex. 2 (Jensen Answer) ¶ 6.]

b) Jensen's Controlling Role At Basin

4. During his tenure at Basin, Jensen saw himself as "kind of the deal guy," and "kind of a leader" who would "see opportunities" "to build shareholder value," including by negotiating the deals with Martin Benowitz and Opus Trust and with Thermax discussed below, where he dealt directly with those customers. [Ex. 5 (Jensen Depo.) 51:21-52:21.]

5. During his tenure as Basin's CEO, Jensen was generally aware of how many water systems were under service contracts. [Ex. 5 (Jensen Depo.) 91:18-91:21.] In 2006, Jensen was involved in most of the projects, and was generally aware of how many systems had been leased and how many had been sold. [Ex. 5 (Jensen Depo.) 91:22-92:3, 92:5-92:8, 92:10-92:21.] Although he became less involved after Basin hired Michael Stark ("Stark") as Chief Operating Officer ("COO") in about October 2006, Jensen stayed involved and knew about transactions at least through the end of 2006 because customers contacted him. [Ex. 5 (Jensen Depo.) 92:22-93:2, 93:5-93:14, 94:5.] Moreover, as set forth below, Jensen continued to review, sign and certify Basin's annual and quarterly filings with the Commission through November 2007, when Basin filed its 10-Q for the quarter ended September 30, 2007.

6. During the period Jensen was CEO, only he and Tekulve were running the company. [Ex. 5 (Jensen Depo.) 79:11-79:14.]

2. Thomas C. Tekulve, Jr.

a) Tekulve's Background, Including As An Accountant And Officer Of Public Companies

7. **Thomas C. Tekulve, Jr. ("Tekulve")** was the chief financial officer

1 of Basin Water, Inc. from September 2004 to May 2008; he was demoted to the
2 position of Vice President of Business Development in June 2008, in which
3 position he remained until he resigned effective October 8, 2008. [Ex. 1
4 (Complaint) ¶ 7; Ex. 3 (Tekulve Answer) ¶ 7; Ex. 6 (Tekulve Depo.) 17:24-18:1.]

5 8. Prior to his tenure at Basin, Tekulve was an officer of two other public
6 companies: from 1999 to 2004 he was the VP Finance of Southwest Water, Inc.,
7 and from 1994 to 1998 he was the CFO of Safeguard Health Enterprises. [Ex. 1
8 (Complaint) ¶ 7; Ex. 3 (Tekulve Answer) ¶ 7; Ex. 6 (Tekulve Depo.) 15:22-16:17.]
9 Tekulve has been employed as director of finance for Primoris Services
10 Corporation, a public company headquartered in Dallas, Texas, since September
11 2009. [Ex. 6 (Tekulve Depo.) 12:17-13:21, 13:24-13:25, 14:20-14:20.] In that
12 capacity, he reports directly to the chief financial officer of Primoris, and assists in
13 the preparation of financial statements, including initially drafting them as well as
14 the company's quarterly and annual filings with the Commission on Forms 10-Q
15 and 10-K. [Ex. 6 (Tekulve Depo.) 13:22-13:23, 14:5-14:18.]

16 9. Tekulve was licensed by the State of Oregon as a certified public
17 accountant in 1978. [Ex. 6 (Tekulve Depo.) 13:22-13:23, 14:5-14:18.] During the
18 relevant period, Tekulve's CPA license was on inactive status. [*Id.*] Tekulve was
19 a staff auditor for the major accounting firm Arthur Andersen from 1971-78; when
20 he left Arthur Andersen, Tekulve was at least a senior auditor, and he supervised
21 lower level accounting personnel on some audits. [Ex. 6 (Tekulve Depo.) 11:23-
22 12:16.] Tekulve earned an MBA degree in 1987. [Ex. 1 (Complaint) ¶ 7; Ex. 3
23 (Tekulve Answer) ¶ 7.] Tekulve resides in Yorba Linda, California. [*Id.*]

24 **b) Tekulve's Controlling Role At Basin**

25 10. As CFO, Tekulve had responsibility for, among other things, Basin's
26 financial structure and organization within Basin. [Ex. 1 (Complaint) ¶ 7; Ex. 3
27 (Tekulve Answer) ¶ 7.] Tekulve created the financial organization within Basin.
28 [Ex. 6 (Tekulve Depo.) 18:5-18:8, 18:15.] When Tekulve joined Basin, it was

1 supported by one half-time accountant. [*Id.*] Tekulve hired various individuals,
2 including his friend Douglas Hansen, who he hired as Basin's Director of Finance.
3 Tekulve hired Hansen even though Hansen had been enjoined in a previous lawsuit
4 brought against him by the Commission, and barred from appearing or practicing
5 before the Commission as an accountant, facts which Tekulve knew and conveyed
6 to Jensen before Basin became a public company, as explained below. [*See* Ex. 6
7 (Tekulve Depo.) 32:11-32:24, 33:14-33:23, 34:13-34:19; Ex. 7 (Hansen Depo.)
8 29:2-29:3, 46:15-46:20.]

9 11. Hansen reported directly to Tekulve. [Ex. 5 (Jensen Depo.) 64:9-
10 64:14; Ex. 7 (Hansen Depo.) 46:15-46:20.] In 1994, the Commission had sued
11 Hansen for violation of the antifraud provisions of the federal securities laws. *SEC*
12 *v. Hansen*, CV94-6548 (C.D. Cal.). [Ex. 8 (Depo. Ex. 909 (Complaint).)] On
13 February 16, 1995, a permanent injunction was entered against Hansen pursuant to
14 his consent. [Exs. 9 & 10 (Depo. Exs. 904 & 905 (Judgment and Consent); Ex. 7
15 (Hansen Depo.) 22:13-22:22 & 22:21-22:22; 23:4-23:15; 23:18-24:9; 40:17-41:3.]
16 Additionally, Hansen was denied the privilege of appearing or practicing as an
17 accountant before the Commission in a Commission administrative proceeding
18 brought based upon the injunction. [Ex. 11 (Depo. Ex. 908 (Order)); *see also* Ex. 7
19 (Hansen Depo.) 25:11-25:16; 25:25-26:3.] Hansen was also investigated by
20 criminal authorities in connection with the facts alleged in the Commission action;
21 Hansen did not tell Singer Lewak Greenbaum & Goldstein LLP ("SingerLewak"),
22 Basin's auditors, or Jensen or Tekulve about this investigation. [Ex. 6 (Tekulve
23 Depo.) 33:9-33:13; Ex. 7 (Hansen Depo.) 38:16-39:23; 39:7-39:20.] Hansen
24 relinquished his CPA license because the California State Board of Accountancy
25 noticed a hearing relating to the allegations made by the Commission. [Ex. 7
26 (Hansen Depo.) 16:4-16:13; 16:21-16:23.]

27 12. Hansen told Tekulve that he had been sued by Commission when
28 Tekulve interviewed him for a position as controller at Southwest Water, where

1 both were employed prior to being employed at Basin; Hansen reminded Tekulve
2 that he had been sued by the Commission when Hansen approached him in 2005
3 about working at Basin, and told Tekulve he should tell Jensen as well. [Ex. 6
4 (Tekulve Depo.) 32:11-32:24, 33:14-33:23, 34:13-34:19; Ex. 7 (Hansen Depo.) at
5 35:11-37:14.]

6 13. Before Basin hired Hansen, Tekulve did tell Jensen that Hansen had
7 “entered into a consent decree with the Commission that prohibited him from
8 being an officer.” [Ex. 5 (Jensen Depo.) 64:18-64:3; *see also* Ex. 6 (Tekulve
9 Depo.) 33:14-33:19, 34:13-34:19.] Tekulve understood that Hansen was not
10 permitted to sign company filings; he nevertheless did not consider whether
11 Hansen should be signing management representation letters to Basin’s auditors,
12 which Hansen did, as set forth below. [Ex. 6 (Tekulve Depo.) 33:20-34:9.] Jensen
13 conducted no further investigation regarding Hansen; nor did he discuss the matter
14 with Hansen. [Ex. 5 (Jensen Depo.) 64:18-65:9.]

15 14. Tekulve was also responsible for establishing a system of internal
16 controls for the company. [Ex. 6 (Tekulve Depo.) 19:11-19:23.] These “controls”
17 included “vetting” transactions between Tekulve and Hansen. [Ex. 6 (Tekulve
18 Depo.) 19:20-19:23.] Tekulve and Hansen also recommended hiring SingerLewak
19 as Basin’s auditor, which recommendation was formally approved by Basin’s audit
20 committee. [Ex. 6 (Tekulve Depo.) 19:24-21:5.] SingerLewak was recommended
21 in part because Basin was a small company without a lot of resources, and Tekulve
22 understood that Singer would “work with” Basin, accept its small size, and charge
23 a smaller fee. [Ex. 6 (Tekulve Depo.) 21:6-21:24.]

24 15. Tekulve understood that he was ultimately responsible for the
25 accuracy of Basin’s financial statements. [Ex. 6 (Tekulve Depo.) 21:25-22:4.]
26 Tekulve also always reviewed the final version of the Management Discussion and
27 Analysis (“MD&A”) section of Basin’s filings with the Commission, as well as
28 sometimes preparing the first draft of the MD&A. [Ex. 6 (Tekulve Depo.) 22:5-

22:9, 22:22-23:13, 23:16-23:19.] With regard to the remainder of the Forms 10-Q and 10-K, Tekulve acted as both drafter and reviewer, but regardless of who drafted the document, Tekulve always fully reviewed it. [Ex. 6 (Tekulve Depo.) 24:4-24:9, 24:16-24:17, 24:21-25:2.]

B. The Related Entity

16. **Basin Water, Inc. (“Basin”)** was a Delaware corporation headquartered in Rancho Cucamonga, California. [Ex. 1 (Complaint) ¶ 8; Ex.2 (Jensen Answer) ¶ 8; Ex. 3 (Tekulve Answer) ¶ 8.] During the relevant period, Basin was engaged in the business of designing, manufacturing and servicing groundwater treatment systems. [*Id.*] It was founded by Jensen on or about December 1999. [*Id.*] Basin became a public company on May 11, 2006, when its stock was initially registered with the Commission pursuant to Section 12(g) of the Exchange Act, 15 U.S.C. § 78l(g). [Ex. 1 (Complaint) ¶ 8; Ex. 3 (Tekulve Answer) ¶ 8.] Basin’s stock traded on the Nasdaq National Market until July 31, 2006, when its common stock became registered pursuant to Section 12(b) of the Exchange Act, 15 U.S.C. § 78l(b), and began trading on the Nasdaq Global Market. [Ex. 1 (Complaint) ¶ 8; Ex. 2 (Jensen Answer) ¶ 8 (admitting Basin stock publicly traded on NASDAQ); Ex. 3 (Tekulve Answer) ¶ 8.] On July 16, 2009, Basin filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. [Ex. 1 (Complaint) ¶ 8; Ex. 3 (Tekulve Answer) ¶ 8.] On August 5, 2009, the Nasdaq delisted Basin’s stock effective August 17, 2009. [Ex. 1 (Complaint) ¶ 8; Ex. 3 (Tekulve Answer) ¶ 8.]

C. Summary Of The Fraudulent Scheme

1. Summary Of Overstatements Of Basin’s Financial Results

17. As set forth with particularity below, the Defendants caused material overstatements in almost all of Basin’s quarterly filings and both of its annual filings for its fiscal years 2006 and 2007. On February 10, 2009, after each of the Defendants had resigned from their positions as CEO and CFO, respectively, Basin

restated its financial results, filing amended Forms 10-Q and 10-K for each of the relevant periods. [See Ex. 1 (Complaint) ¶ 9; Ex. 2 (Jensen Answer) ¶ 9; Ex. 3 (Tekulve Answer) ¶ 9; Ex. 12 (Depo. Ex. 845, Restated Forms 10-K).] The Defendants' fraudulent acts caused the following overstatements of Basin's financial results:

Basin's Overstated Financial Results – 2006

	Q1 2006	Year-To-Date Q2 2006	Q3 2006	Year-To-Date Q3 2006	FY 2006
Reported System Sales	\$3,091,000	\$7,258,000	\$3,936,000	\$11,194,000	\$13,861,000
Adjusted System Sales	\$1,591,000	\$5,908,000	\$3,484,533	\$9,392,533	\$11,930,283
Percentage Overstatement of System Sales	94%	23%	13%	19%	16%
Reported Total Revenue	\$3,703,000	\$8,666,000	\$4,846,000	\$13,512,000	\$17,114,000
Adjusted Total Revenue	\$2,203,000	\$7,316,000	\$4,394,533	\$11,710,533	\$15,183,283
Percentage Overstatement of Total Revenue	68%	18%	10%	15%	13%
Reported Gross Profit	\$1,147,000	\$2,545,000	\$309,000	\$2,805,000	\$(2,992,000)
Adjusted Gross Profit	\$277,479	\$1,762,431	\$85,765	\$1,231,765	\$(3,789,492)
Percentage Overstatement of Gross Profit	313%	44%	260%	128%	21%

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Basin's Overstated Financial Results – 2007

	Q2 2007	Year-To-Date Q2 2007	Q3 2007	Year-To-Date Q3 2007	Q4 2007	FY 2007
Reported System Sales	\$5,199,0000	\$6,128,000	\$3,773,000	\$9,901,000	\$3,576,000	\$13,477,000
Adjusted System Sales	\$1,234,746	\$2,163,746	\$1,852,490	\$4,016,236	\$1,474,064	\$5,490,297
Percentage Overstatement of System Sales	321%	183%	104%	147%	143%	145%
Reported Total Revenue	\$6,414,000	\$8,021,000	\$5,346,000	\$13,367,000	\$5,417,000	\$18,784,000
Adjusted Total Revenue	\$2,449,746	\$4,056,746	\$3,425,490	\$7,482,236	\$3,315,064	\$10,797,297
Percentage Overstatement of Total Revenue	162%	98%	56%	79%	63%	74%
Reported Gross Profit	\$25,000	\$(262,000)	\$(6,779,000)	\$(7,041,000)	\$894,000	\$(6,147,000)
Adjusted Gross Profit	\$(515,161)	\$(802,161)	\$(6,995,399)	\$(7,797,560)	\$183,706	\$(7,613,857)
Percentage Overstatement Gross Profit	105%	67%	3%	10%	387%	19%

[Declaration of Roger Boudreau (Commission accountant), ¶¶ 3-16.]

2. Summary Of Jensen's Trading Profits

18. Beginning on December 12, 2006, and continuing through August 7,

2008, prior to Basin's August 11, 2008, announcement that it would restate its 2006 and 2007 financial statements, Jensen sold 1,860,943 shares of Basin stock and gifted 290,000 more to his *alma mater*, MIT, gaining and realizing profits of \$9,029,331 and taking charitable tax deductions of \$763,345 (thereby receiving a gain from his tax deductions of approximately \$220,655) as set forth below. [See Ex. 1 (Complaint) ¶ 10; Ex. 2 (Jensen Answer) ¶ 10 (admitting that he sold and donated Basin shares from December 12, 2006 through August 11, 2008; Tercero Dec. ¶¶ 78, 92] Jensen has not reimbursed Basin for any of the profits realized from these sales and gifts of Basin securities.

3. Summary Of Jensen And Tekulve's Compensation,
Including Incentive-Based Compensation

19. During the period when they were causing Basin to fraudulently inflate its revenues and for the twelve-month period following each of the false filings with the Commission, Jensen received \$421,894 and Tekulve received \$325,144 in salary, and Jensen received \$210,385 and Tekulve received \$150,000 in bonuses, some or all of which constituted incentive-based compensation. [Ex. 4 (proxy statement) at 01646660; *see also* Ex. 3 (Tekulve Answer) ¶ 11 (Tekulve admits he received an annual salary of \$125,000 in 2005, that his salary increased to \$151,250 in the second quarter of 2006, and that his salary later increased to \$200,000; he also admits he received a \$100,000 bonus in 2007 and a \$50,000 bonus in 2008.) Additionally, during the same period, the Defendants each received equity-based compensation: Jensen received approximately \$73,276 in Basin stock; and Tekulve received approximately \$41,243 in Basin stock and \$205,037 in Basin stock options. [Ex. 4 at 01646660; *see also* Ex. 3 (Tekulve Answer) ¶ 11 (Tekulve admits he was granted shares of Basin common stock and options for shares of Basin common stock).] Neither Jensen nor Tekulve has ever reimbursed Basin for any of this incentive-based or equity-based compensation. [Ex. 3 (Tekulve Answer) ¶ 11.]

D. The Defendants Caused Basin To Materially Overstate Its Financial Results Throughout 2006 And 2007

20. With regard to all of the transactions described below, and during the entire time Tekulve was employed by Basin, Tekulve understood what was required by Generally Accepted Accounting Principles (“GAAP”) to recognize revenue. [Ex. 6 (Tekulve Depo.) 17:7-18:4.] Tekulve correctly understood that the “four major prongs” of Staff Accounting Bulletin (“SAB”) 104 were:

- a. Evidence of “an agreement between two parties”;
- b. A “fixed and determinable price”;
- c. Reasonable assurance of collectability;
- d. Provision of either a service or goods.

[*Id.* 17:14-17:20; *see also* Boudreau Declaration ¶ 17 & Ex. 2 thereto at 11-13 (copy of SAB 104) (generally describing the four criteria: (1) Persuasive evidence of an arrangement exists; (2) Delivery has occurred or services have been rendered; (3) The Seller’s price to the buyers is fixed or determinable; and (4) Collectibility is reasonably assured).]

21. Jensen also understood there were requirements for recognizing revenue. Among other things, he understood, based on his experience, that an order was not valid if it was contingent. [Ex. 5 (Jensen Depo.) 12:17-12:18.] He more specifically understood, including in 2006, that revenue could not be recognized on a contingent order. [*Id.* 14:1-14:5.] Jensen further understood, including in 2006, that collectability was relevant to recognizing revenue. [*See id.* 14:6-14:20.]

1. Basin Filed A Securities Registration Statement Incorporating By Reference Future Annual And Quarterly Filings

22. On May 15, 2006, Jensen and Tekulve signed, and Basin filed, a registration statement on Form S-8 (“S-8 Registration Statement”) with the Commission registering the offering of approximately 6.7 million shares of its

1 common stock, which offering included any shares issuable pursuant to Basin's equity
2 incentive, stock option, and employee stock purchase plans. [Ex. 1 (Complaint) ¶ 28;
3 Ex. 2 (Jensen Answer) ¶ 28; Ex. 3 (Tekulve Answer) ¶ 28; Ex. 13 (S-8 Registration
4 Statement).] The S-8 Registration Statement incorporated by reference all documents
5 to be filed by Basin pursuant to Sections 13(a), 13(c), 14, or 15(d) of the Exchange
6 Act, 15 U.S.C. §§ 78m(a), 78m(c), 78n or 78o(d), after the date of the S-8
7 Registration Statement and prior to the filing of a post-effective amendment indicating
8 that all securities offered had been sold or deregistering the securities then remaining
9 unsold. [Ex. 3 (Tekulve Answer) ¶ 28; Ex. 13 (S-8 Registration Statement) at
10 01645432.] A document incorporated by reference was to become and became a part
11 of the S-8 Registration Statement from the date that the document was filed with the
12 Commission, including the materially false and misleading Forms 8-K, 10-Q, and 10-
13 K identified in this Statement Of Facts. [Ex. 13 at 01645432.]

14 **2. The Defendants Materially Overstated Basin's Q1 2006**
15 **Financial Results By Recognizing Revenue On A Sale That**
16 **Had Not Been Finalized, And For Which \$1.35 Million Was**
17 **Uncollectable**

18 **a) Jensen Negotiated A Purported \$1.5 Million Deal**
19 **With Opus Trust And Martin Benowitz; Tekulve**
20 **Prepared The Deal Documents**

21 23. In or about December 2005, Jensen contacted Martin Benowitz
22 ("Benowitz"), an attorney he knew represented foreign investors, proposing that an
23 investor group purchase two Basin units in exchange for money and five percent of
24 the shares of BionBasin, Inc. ("BION"), a wholly owned subsidiary of Basin. [See
25 Ex. 1 (Complaint) ¶ 12; Ex. 2 (Jensen Answer) ¶ 12; Ex. 14 (Jensen Testimony
26 ("Test."))² 26:23-27:10).]

27
28 ² All references to "testimony" are to testimony taken by the Commission in
its investigation that preceded the filing of this action.

1 24. Subsequently, on or about December 22, 2005, Tekulve, pursuant to
2 Jensen's instructions, sent to Benowitz by fax a letter re: "Agreement for purchase of
3 two Basin Water ion exchange units," copying Jensen by email. [See Ex. 1 (Complaint)
4 ¶ 12; Ex. 2 (Jensen Answer) ¶ 12; Ex. 3 (Tekulve Answer) ¶ 12; Ex. 15 (Tekulve Test.)
5 20:23-21:18; Ex. 6 (Tekulve Depo.) 40:18-41:12; Ex. 16 (Depo. Ex. 7) (letter).]

6 25. Jensen then sent an email to Benowitz instructing him to redline his
7 comments and return the letter to Tekulve. [Ex. 17 (Depo. Ex. 9 (email chain)) at
8 00001914-15.] After Benowitz did so on December 26, Tekulve emailed him a
9 revised version, copying Jensen, on December 28. [Ex. 1 (Complaint) ¶ 12; Ex. 3
10 (Tekulve Answer) ¶ 12; *see also* Ex. 2 (Jensen Answer) ¶ 12; Ex. 17 (email chain)
11 at 00001914.] Benowitz then signed the three page letter as the "legal
12 representative" of Opus Trust, an investor group purportedly based in the
13 Caribbean island of Nevis, and faxed it to Tekulve on or about December 29, 2005
14 (the "Opus Letter"). [See Ex. 1 (Complaint) ¶ 12; Ex. 3 (Tekulve Answer) ¶ 12;
15 Ex. 6 (Tekulve Depo.) 40:1-40:17; Ex. 18 (Depo. Ex. 514, Opus Letter).]

16 26. The Opus Letter had a designated space for Jensen to sign on behalf
17 of Basin in his capacity as Basin's president, which Jensen never signed. [See Ex.
18 5 (Jensen Depo.) 35:15-36:12 & 36:14; Ex. 6 (Tekulve Depo.) 42:8-42:25; Ex. 19
19 (Depo. Ex. 223, 3/3/06 email from Tekulve to Jensen).]

20 27. The Opus Letter provided, among other things, that:

- 21 a. The agreement was between Basin and Opus [Ex. 18 at
22 00842086];
- 23 b. The two systems to be sold were units located in the East
24 Valley Water District [Ex. 18 at 00842086; Ex. 14 (Jensen
25 Test.) 37:5-38:11];
- 26 c. In addition to the \$150,000 down payment for the systems,
27 which Opus paid by checks transmitted to Tekulve on or about
28 December 29, 2005 [Ex. 15 (Tekulve Test.) 38:6-38:20; Ex. 20

(Depo. Ex. 4, checks)], Opus was required to pay \$1.35 million balance within two years [Ex. 18 at 00842086 at ¶ 2.b.ii.], and Basin would grant Opus Trust 5% or 500,000 shares of stock in its wholly-owned subsidiary, BION, upon Opus Trust's final payment for the units [Ex. 18 at 00842087 at ¶ 6]; and

d. A "definitive purchase agreement" would be prepared by the seller, Basin, and was subject to review by Opus and its counsel [Ex. 18 at 00842087 at "Other Provisions" ¶ 1.].

[Ex. 18 (Depo. Ex. 514, the Opus Letter); *see also* Ex. 3 (Tekulve Answer) ¶ 13.]

28. Jensen did not know in 2006, and does not now know, who "Opus Trust" is, who the trustee was, who the beneficiaries were, how many beneficiaries there were, or what assets Opus Trust had; all he knew was that Benowitz had a relationship with them and represented them in some capacity. [Ex. 5 (Jensen Depo.) 29:7-30:6.] Jensen took no steps to ensure that Opus Trust had the financial wherewithal to pay the \$1.5 million owed pursuant to the Opus Letter. [*Id.* 31:13-31:18.] Nor did Jensen instruct anyone in Basin's accounting department to look into Opus Trust and determine whether or not it could pay for the units, or discuss with anyone in Basin's accounting department whether Opus Trust could pay for the units. [*Id.* 31:13-31:4.]

29. Tekulve also did not know who Opus Trust was beyond "it revolved primarily around" Benowitz, although he does not know Benowitz' specific role; nor does Tekulve recall if there was a trustee or beneficiaries. [Ex. 6 (Tekulve Depo.) 38:11-38:25, 39:3-39:7, 39:9-39:25.] Tekulve took no steps, such as requesting or obtaining financial statements, to determine whether collectability was reasonably likely from Benowitz and/or Opus Trust; instead, he relied on the fact that Benowitz had been "a longtime investor" in Basin and "had a relationship with Peter Jensen," even though he had no specific direct knowledge of Benowitz' finances and made no attempt to determine what Opus Trust's finances were, what their assets were or how

1 Basin would obtain payment from Opus Trust if it did not pay timely. [Ex. 6
2 (Tekulve Depo.) 51:20-53:11. 53:13-53:15; 53:17-53:23, 54:5-54:9.]

3 30. On December 29, 2005, after receiving the signed Opus Letter from
4 Benowitz as well as an email from Benowitz stating that he would be sending the
5 \$150,000 down payment by Federal Express to Basin that evening, Tekulve sent an
6 email to Benowitz stating: "Marty, That's Great! Next week I'll get going on the
7 definitive agreement. I hope to have a draft to you by the first part of the week of
8 January 9th." [See Ex. 3 (Tekulve Answer) ¶ 13 (Tekulve admits that Basin received a
9 \$150,000 payment for the Opus Trust transaction in December 2005); Ex. 20 (checks).]

10 31. On March 3, 2006, Tekulve sent an email to Jensen attaching the
11 Opus Letter signed by Benowitz, which included Tekulve's handwritten
12 suggestions for changes to the agreement. [Ex. 6 (Tekulve Depo.) 42:8-43:4.
13 43:15-46:5; Ex. 19 (Depo. Ex. 223 (3/3/06 email and attachment)).] Among other
14 suggestions, Tekulve was trying to specifically identify the units to be sold to Opus
15 Trust and Benowitz because Basin's auditors had raised the issue, precluding
16 revenue recognition in December 2005; Tekulve discussed identification of units to
17 be sold with Jensen during the first quarter, which ended March 31, 2006. [Ex. 6
18 (Tekulve Depo.) 43:18-44:11, 46:12-47:4.]

19 32. Tekulve's March 3, 2006, email to Jensen stated:

20 Attached is the Benowitz letter.

21 I don't think you or I ever signed it!

22 This copy has the comments I've made – several items I'd like to
23 change/clarify with him, since the December date is not critical.

24 But we'll need this one in Q1 (Obviously).

25 [Ex. 1 (Complaint) ¶ 16; Ex. 3 (Tekulve Answer) ¶ 16; *see also* Ex. 2 (Jensen
26 Answer) ¶ 16; Ex. 5 (Jensen Depo.) 35:15-36:12 & 36:14; Ex. 19 (Depo. Ex. 223,
27 3/3/06 email); Ex. 6 (Tekulve Depo.) 42:8-42:25.]

28 33. Over three months later, after the close of Basin's first quarter on

1 March 31, 2006, and after \$1.5 million in revenue had been recognized on the
2 purported transaction with Opus Trust, on or about June 16, Tekulve sent Jensen an
3 email attaching a redline version of a draft Unit Purchase Agreement with Opus
4 Trust. [See Ex. 1 (Complaint) ¶ 17; Ex. 3 (Tekulve Answer) ¶ 17 (admitting he
5 emailed a redlined document he describes as the “Opus Letter” to Jensen on June
6 16, 2006); Ex. 5 (Jensen Depo.) 67:13-67:23; Ex. 21 (Depo. Ex. 224 (email)).].
7 The email pointed out, among other things, that the length of time for Opus Trust
8 to make the final payment had been extended from two to three years, that the units
9 Opus Trust would own “as of March 30” would be certain units in Salinas, and that
10 the BION stock would be issued “today,” before Opus Trust made its final
11 payment, because to do otherwise would “reduce today’s revenues.” [See *id.*; see
12 also Ex. 2 (Jensen Answer) ¶ 17.]

13 34. Also on June 16, 2006, a SingerLewak auditor, Helen Wu, emailed
14 to Tekulve a request for a copy of the “Benowitz Agreement,” among other items,
15 which she described as “All important,” in conducting the review of Basin’s Q1
16 financial statements for the period ended March 30, 2006; Tekulve forwarded
17 Wu’s email to Jensen on June 17, 2006, because he wanted to prompt Jensen to
18 review the draft agreement he had sent to Jensen on June 16, 2006. [Ex. 21 (Depo.
19 Ex. 224 (June 16 email from Tekulve to Jensen attaching draft agreement); Ex. 22
20 (Depo. Ex. 974 (email); Ex. 5 (Jensen Depo.) 68:22-70:5, 70:8; Ex. 6 (Tekulve
21 Depo.) 63:23-64:15, 64:16-64:25.]

22 35. On June 20, 2006, Tekulve sent to Benowitz a redline version of the
23 draft Unit Purchase Agreement, which identified units in Salinas as the units to be
24 sold to Opus Trust, which differed from the Salinas units identified in the version
25 he sent to Jensen on June 16. [See Complaint ¶ 18; Ex. 3 (Tekulve Answer) ¶ 18;
26 see also Ex. 6 (Tekulve Depo.) 66:19-67:4; Ex. 24 (Depo. Ex. 225 (email with
27 draft Agreement).] It was Tekulve’s practice to review redline drafts of the
28 Agreement before sending them to Benowitz. [Ex. 6 (Tekulve Depo.) 67:21-68:2.]

1 36. Later on June 20, 2006, Benowitz responded with two emails
2 containing additional proposed language. [Ex. 6 (Tekulve Depo.) 68:23-70:2; Ex.
3 25 (Depo Ex. 516 (Benowitz email); Ex 26 (Depo. Ex. 517) (Benowitz email).]

4 37. On or about June 23, 2006, Tekulve emailed to Benowitz the Opus
5 Agreement, noting in his diary “I finalized the Benowitz deal & sent email off,
6 [Benowitz] will sign in am.” [Ex. 1 (Complaint) ¶ 20; Ex. 3 (Tekulve Answer) ¶
7 20.] On or about June 23, 2006, Benowitz signed and initialed the Opus
8 Agreement on behalf of Opus Trust, and caused it to be faxed to Tekulve. [See Ex.
9 6 (Tekulve Depo.) 77:15-78:3.]

10 38. Sometime after Benowitz signed the Opus Agreement, and possibly as
11 late as September 5, 2006, Jensen signed and initialed the sixteen page “Unit
12 Purchase Agreement” (“Opus Agreement”) purporting to be dated “as of March 30,
13 2006,” on behalf of BION. [See Ex. 1 (Complaint) ¶ 19; Ex. 2 (Jensen Answer) ¶
14 19; *see also* Ex. 3 (Tekulve Answer) ¶ 19; Ex. 6 (Tekulve Depo.) 54:18-55:12,
15 78:9-79:4; Ex. 23 (Depo. Ex. 12, the Opus Agreement); Ex. 27 (Depo. Ex. 521,
16 9/5/06 Tekulve email to auditors attaching Opus Agreement signed by Jensen).]

17 39. Certain of the clauses in the Opus Agreement were required to be
18 specifically initialed by the parties, including a clause labeled “Liquidated
19 Damages,” which was printed in all capital letters, and which provided that Basin’s
20 recovery of damages from the buyer would be limited to the “progress payments” in
21 the event of default by the buyer, which in this case consisted of the \$150,000 paid
22 by Benowitz in December 2005. [Ex. 23 (Opus Agreement) at 9-10 ¶ 18] Jensen
23 signed the document and initialed this clause. [*Id.*; Ex. 5 (Jensen Depo.) 33:4-
24 33:21.] Although Jensen does not have a specific recollection of whether he read
25 the document before signing and initialing it, it was his practice when he signed a
26 contract on behalf of Basin to review the contract before signing it. [*Id.* 33:22-
27 34:15; 34:17.] Jensen was also aware when he signed the agreement, that Opus had
28 paid only \$150,000 of the purchase price. [*Id.* 38:5-38:8.] Tekulve also read the

entire agreement before Benowitz signed it. [Ex. 6 (Tekulve Depo.) 81:12-81:13.]

**b) Jensen And Tekulve Caused Revenue To Be
Improperly Recognized On The Opus Trust Deal**

40. The terms of the sixteen page Opus Agreement differ from those in the three page Opus Letter in that:

- a. The Agreement was between BION, rather than Basin, and Opus Trust;
- b. Different systems, located in Salinas, California, rather than the East Valley Water District, had been substituted for the units that were the subject of the Opus Letter;
- c. The Agreement contained a liquidated damages clause, all in capital letters, limiting Basin's right to recover to payments already made by Opus Trust should Opus Trust default on its obligation to purchase the units, which payments totaled \$150,000 at the time the Agreement was executed; and
- d. The balance would be paid by Opus Trust in three years, rather than two years, and that that period could be extended by two years upon the request of Opus Trust and payment of an additional \$250,000 by Opus Trust.

[See Ex. 1 (Complaint) ¶ 21; Ex. 3 (Tekulve Answer) ¶ 21; Ex. 23 (Opus Agreement); Ex. 18 (Opus Letter).]

41. Notwithstanding the liquidated damages clause in the Opus Agreement that meant that Opus Trust would never have to pay the remaining \$1,350,000 of the purchase price for the two water systems, and the lack of a definitive agreement on March 30, 2006, reflecting the understanding of the parties, Jensen and Tekulve caused Basin to recognize \$1,500,000 in revenue from a purported sale to Opus Trust based on the Opus Letter. [Ex. 1 (Complaint) ¶ 22; Ex. 3 (Tekulve Answer) ¶ 22 (admitting Basin recognized \$1,500,000 in revenue).]

1 In fact, as of March 30, 2006, Basin had not signed the Opus Letter. Nor had a
2 definitive purchase agreement been prepared or signed by either party.

3 42. The revenue recognized on the Opus Trust transaction constituted
4 41% of the company's quarterly revenues. [Ex. 1 (Complaint) ¶ 22; Ex. 3 (Tekulve
5 Answer) ¶ 22 (admitting the \$1.5 million in revenue recognized constituted slightly
6 more than 40% of the revenues reported for the first quarter of 2006); Ex. 6
7 (Tekulve Depo.) 47:19-47:24; *see also* Boudreau Declaration, ¶ 3 (chart).]

8 43. Moreover, pursuant to the Opus Agreement, Benowitz was receiving
9 payments from Basin. [See Ex. 27 (email); Ex. 28 (Depo. Ex. 520 (8/22/06 email
10 from Tekulve to Benowitz explaining amount due Benowitz for April-June 2006 is
11 \$45,000.) Jensen and Tekulve were both aware that Benowitz was supposed to
12 receive payments under the Opus Agreement and was complaining about not
13 receiving payments timely from Basin. [See Ex. 5 (Jensen Depo.) 49:7-49:18.]

14 44. Jensen understood at the time that the full amount of the revenue on
15 the Benowitz transaction (\$1,500,000) was recognized in the first quarter of 2006,
16 which ended March 30, 2006, and that it would be reported in Basin's first quarter
17 ("Q1") Form 10-Q. [Ex. 5 (Jensen Depo.) 70:23-71:3, 71:5-71:11, 71:16-72:1.]
18 He nevertheless did not discuss with Tekulve the fact that the Benowitz agreement
19 was still in draft form in mid-June. [Ex. 5 (Jensen Depo.) 70:9-70:11, 70:14.]

20 45. Tekulve also understood that the full \$1.5 million was recognized on
21 the transaction with Opus Trust in the first quarter of 2006 ended March 31, 2006
22 and that it was about 40% of Basin's revenue. [Ex. 6 (Tekulve Depo.) 47:19-
23 47:24.] Tekulve also understood that this amount of revenue was material to
24 Basin; indeed, in his view, "almost everything was material. We were such a small
25 company." [Ex. 6 (Tekulve Depo.) 47:25-48:3, 48:16-48:19, 48:23-48:24.]

26 ///

27 ///

28 ///

c) **Jensen And Tekulve Made Misrepresentations And Omissions Of Material Fact Regarding The Opus Deal To Basin's Auditors**

46. Jensen never discussed with anyone at SingerLewak, Basin's auditors, the transaction with Benowitz and Opus Trust. [Ex. 5 (Jensen Depo.) 59:6-59:8.] Nor was Jensen ever present at any discussion with the auditors about the transaction. [Id. 59:9-59:13.] In fact, Jensen never had any conversations with the auditors, beyond being introduced by Tekulve to Gale Moore, the audit partner. [Id. 59:14, 59:17-60:8.] Nor did Jensen ever consult the auditors about any transaction or ask anyone in the accounting department, including Tekulve, to consult with the auditors about any specific transaction Basin did. [Id. 60:9-60:11, 60:14-60:20, 61:14-61:19.] Similarly, Jensen never asked any attorney for Basin whether the accounting for a specific transaction was proper; nor did he ask Tekulve to ask attorneys for Basin whether accounting for any specific transaction was proper. [Id. 61:20-62:2.]

47. Tekulve also cannot identify any specific conversation he had with any of the auditors, notwithstanding his statement in an email that he intended to run the Opus deal by the auditors. [Ex. 6 (Tekulve Depo.) 72:1-73:15, 74:2-74:18, 74:23, 74:25-75:23.]

48. On June 23, 2006, the same day Benowitz signed the backdated Opus Agreement, Jensen and Tekulve each signed a management representation letter to SingerLewak, Basin's auditors, in connection with SingerLewak's review of Basin's Q1 financial statements. [Ex. 1 (Complaint) ¶ 23; Ex. 2 (Jensen Answer) ¶ 23; Ex. 3 (Tekulve Answer) ¶ 23; Ex. 5 (Jensen Depo.) 62:3-62:18; Ex. 6 (Tekulve Depo.) 89:18-89:24, 90:24-91:2; Ex. 28 (Depo Ex. 636 (letter)) at 4.] Jensen and Tekulve confirmed "that we are responsible for the fair presentation of the interim financial information in conformity with accounting principles generally accepted in the United States of America and Rule 10-01(a)-(c) of Regulation S-X." [Ex. 28 at 1.] They further represented in this Management Representation Letter, among other things, that:

- a. The interim financial information was presented in accordance with GAAP applicable to interim financial information applied on a basis substantially consistent with the same period in the prior year, the immediately preceding quarter and the prior fiscal year [Ex. 28 at 1 ¶ 1];
- b. They had made available to SingerLewak all financial records and related data [Ex. 28 at 1 ¶ 2.a.];
- c. They had no knowledge of any fraud or suspected fraud affecting the Company involving management [Ex. 28 at 1-2 ¶ 6.a.];
- d. There were no material transactions that had not been properly recorded in the accounting records underlying the interim financial information [Ex. 28 at 2 ¶ 12]; and
- e. No events or transactions other than those disclosed in the interim financial information had occurred subsequent to March 31, 2006 that would require adjustment to, or disclosure in, the interim financial information [Ex. 28 at 3].

[See also Ex. 1 (Complaint) ¶ 23; Ex. 3 (Tekulve Answer) ¶ 23.] Each of these representations was false because recognition of revenue from the Opus Trust transaction did not comply with GAAP, these revenues were material to Basin's financial statements, and the Opus Agreement, finalized after March 31, 2006, on or about the day the management representation letter was signed, differed materially from the Opus Letter upon which revenue recognition had been based.

49. Specifically, recognizing \$1.5 million in revenue from the purported sale to Opus Trust for the quarter ended March 31, 2006, violated the GAAP requirements for recognizing revenue because SAB 104 provides, among other provisions, that for revenue to be recognized: (1) persuasive evidence of an arrangement must exist; and (2) reasonable assurance of collectability is required

1 (citing Accounting Research Bulletin (“ARB”) 43). [See Ex. 1 (Complaint) ¶ 24;
2 Ex. 3 (Tekulve Answer) ¶ 24 (admitting these are some of the revenue recognition
3 criteria of SAB 104); Boudreau Declaration at ¶¶ 17-18 & Exs. 2 (SAB 104) & 3
4 (excerpt of ARB 43).] Here, there was no persuasive evidence of an arrangement as
5 of March 31, 2006, when revenue was recognized, because no definitive purchase
6 agreement had been prepared; the parties to the final agreement, executed in June
7 2006, were different; and the terms of the June 2006 agreement were materially
8 different because different systems were being sold to Opus, a liquidated damages
9 clause had been inserted into the agreement, and the term for payment to Basin had
10 been extended from two years to three years. Additionally, collectability was not
11 reasonably assured because of the liquidated damages clause, the three year payment
12 period, and Jensen’s and Tekulve’s utter failure to conduct any due diligence to
13 determine Opus Trust’s ability to pay. In fact, Opus Trust never did make any
14 payments for the systems other than the \$150,000 down payment in made in
15 December 2005. [Ex. 1 (Complaint) ¶ 24; Ex. 3 (Tekulve Answer) ¶ 24.]

16 50. Tekulve understood that the auditors were entitled to rely on the
17 representations being made to them in this and other management representation
18 letters. [Ex. 6 (Tekulve Depo.) 27:3-28:12; 90:15-90:18, 90:21-90:23.]

19 51. In addition to Jensen and Tekulve signing the Management
20 Representation Letter, the letter was also signed by Hansen, Basin’s Director of
21 Finance. [Ex. 28 (letter) at 5.)]

22 52. Neither Jensen, Tekulve nor Hansen ever told anyone at SingerLewak
23 that Hansen had been sued for fraud by the Commission, and subsequently
24 enjoined. [Ex. 7 (Hansen Depo.) 38:4-38:6; Ex. 5 (Jensen Depo.) 65:10-65:12; Ex.
25 29 (Moore Depo.) 83:19-83:25, 84:5-84:15; *see also* Ex. 6 (Tekulve Depo.) 34:10-
26 34:12 (does not recall whether or not he informed SingerLewak).]

27 53. SingerLewak relied on representations made by Hansen in the
28 management representation letters. [Ex. 29 (Moore Depo.) 84:16-84:22.] It would

1 have been material to SingerLewak to know that Hansen had been enjoined in an
2 injunctive action brought by the Commission because it would have been relevant
3 to SingerLewak's evaluation of the integrity of Basin management; for the same
4 reason, it would have been material to SingerLewak to know that Hansen had been
5 suspended from practice before the Commission. [Ex. 29 (Moore Depo.) 85:1-
6 85:3, 85:10-85:15, 85:17-85:22, 85:25-86:2, 86:4-86:5.] Additionally, these facts
7 would have been material to the auditors because they were relevant to whether the
8 auditors could rely on representations made to them in management representation
9 letters and otherwise. [Ex. 29 (Moore Depo.) 86:6-86:10.]

10 d) **Jensen And Tekulve Caused Basin's Materially False**
11 **Financial Results To Be Disseminated To The**
12 **Investing Public**

13 (1) **The Defendants Issued A False Earnings Release**

14 54. On June 26, 2006, Tekulve caused Basin to issue its first quarter
15 earnings release. [Ex. 1 (Complaint) ¶ 25; Ex. 2 (Jensen Answer) ¶ 25; Ex. 3
16 (Tekulve Answer) ¶ 25; Ex. 6 (Tekulve Depo.) 94:6-94:15.] Tekulve caused it to
17 be filed with the Commission on Form 8-K and signed the filing. [Ex. 3 (Tekulve
18 Answer) ¶ 25; Ex. 30 (Depo Ex. 975, Form 8-K).] Tekulve participated in drafting
19 the release. [Ex. 6 (Tekulve Depo.) 94:19-94:21.] Both Jensen and Tekulve
20 reviewed Basin's earnings releases before they were issued. [Ex. 5 (Jensen Depo.)
21 74:13-75:2; Ex. 6 (Tekulve Depo.) 94:6-95:1.]

22 55. The headline on the earnings press release was "**Revenues Increase**
23 **to \$3.7 Million, Gross Profit Increase [sic] to \$1.1 Million.**" [Ex. 3 (Tekulve
24 Answer) ¶ 25; Ex. 30 at 01645481] In the release, it is represented that:

25 Revenues increased 311% to \$3.7 million for the first quarter of
26 2006 as compared to \$0.9 million for the same period of 2005.

27 Revenues from both system sales and contract revenues continue
28 to grow compared to the prior year quarter.

1
2 Gross profit increased for the quarter by 267% to \$1.1 million
3 compared to \$0.3 million for 2005 as a result of the increased
4 volume in system sales. Gross profit as a percentage of revenues
5 was 31% . . .

6 [*Id.*; Ex. 30 at 1645481.]

7 56. Additionally, Jensen is quoted in the press release as saying: “[W]e
8 are pleased with our first quarter results. . . . We anticipate that our revenues will
9 continue to grow during the next several quarters. . . .” [Ex. 30 at 01645481.]
10 Jensen’s practice was to review quotations attributed to him in Basin earnings
11 releases. [Ex. 5 (Jensen Depo.) 75:3-76:3.]

12 57. These representations were materially false and misleading because
13 \$1.5 million – over half – of Basin’s system sales revenues consisted of the
14 improperly recognized revenue from the Opus Trust transaction.

15 58. The press release also stated that the company would provide more
16 detail regarding its first quarter results in a conference call and webcast to be held
17 at 1:30 p.m. Pacific Time that same day. [Ex. 30 at 01645481.] Tekulve had
18 prepared the script and approved the final version of it for that call earlier that day.
19 [See Ex. 3 (Tekulve Answer) ¶ 25 (Tekulve admits he drafted “part of” the script);
20 Ex. 6 (Tekulve Depo.) 95:2-95:24.]

21 (2) **The Defendants Caused The Filing Of A False**
22 **First Quarter 2006 10-Q, And Falsely Certified**
23 **Its Accuracy**

24 59. That same day, Jensen and Tekulve caused Basin to file with the
25 Commission its first quarterly report on Form 10-Q, for its first quarter 2006 (“Q1
26 2006”) ended March 31, 2006. [See Ex. 1 (Complaint) ¶ 26; Ex. 2 (Jensen
27 Answer) ¶ 26; Ex. 3 (Tekulve Answer) ¶ 26; Ex. 31 (Depo Ex. 628 (Q1 2006 Form
28 10-Q)).] Jensen read the Form 10-Q before it was filed, and Tekulve signed the

1 Form 10-Q as Basin's CFO. [Ex. 1 (Complaint) ¶ ; Ex. 2 (Jensen Answer) ¶ 26;
2 Ex. 3 (Tekulve Answer) ¶ 26; Ex. 5 (Jensen Depo.) 72:4-72:23 (Jensen's practice
3 was to review and sign).]

4 60. Among other results, Basin's Form 10-Q reported system sales of
5 \$3,091,000 and total revenues of \$3,703,000. [Ex. 3 (Tekulve Answer) ¶ 26.]
6 These system sales and revenues included the \$1,500,000 in revenue purportedly
7 earned from a sale of systems to Opus Trust. [Ex. 3 (Tekulve Answer) ¶ 26; *see*
8 *also* Ex. 5 (Jensen Depo.) 73:19-74:5; Ex 30 (10-Q) at 01645443.] Additionally,
9 the Form 10-Q states that its revenue increased "by \$2.8 million, or 313%" from its
10 first quarter of the prior year "occurred primarily as a result of growth in sales of
11 our groundwater treatment systems." [Ex. 3 (Tekulve Answer) ¶ 26; Ex.30 (10-Q)
12 at 01645452.] Basin's Form 10-Q does not disclose that 41% of its purported
13 revenues were derived from a purported sale to a single customer for which
14 revenues were not in fact properly recognized. [See Ex. 3 (Tekulve Answer) ¶ 26.]
15 As a result of the improper recognition of revenue, Basin's quarterly revenues were
16 overstated by 68%, its system sales were overstated by 94%, and its gross profits
17 were overstated by 313%. [See Boudreau Declaration ¶ 3 (chart).]

18 61. On or about June 26, 2006, Jensen and Tekulve each certified, among
19 other things, with regard to the Form 10-Q, that:

- 20 a. He had reviewed the Form 10-Q;
- 21 b. Based on his knowledge, the Form 10-Q did not contain any
22 untrue statement of material fact or omit to state a material fact
23 necessary to make the statements made, in light of the
24 circumstances under which they were made, not misleading
25 with respect to the period covered by the report;
- 26 c. Based on his knowledge, the financial statements, and other
27 financial information included in the report fairly presented in
28 all material respects the financial condition, results of

1 operations and cash flows of Basin as of and for the periods
2 presented in the report; and

3 d. He had disclosed to Basin's auditors and the audit committee of
4 Basin's Board of Directors any fraud that involved company
5 management.

6 [Ex. 1 (Complaint) ¶ 27; Ex. 2 (Jensen Answer) ¶ 27; *see also* Ex. 3 (Tekulve
7 Answer) ¶ 27; Ex. 30 (10-Q) at 01645474-77; Ex. 5 (Jensen Depo.) 72:9-72:23; Ex. 6
8 (Tekulve Depo.) 93:9-93:13.]

9 62. Tekulve participated in drafting the Form 10-Q and "absolutely"
10 reviewed the document before signing it. [Ex. 6 (Tekulve Depo.) 93:14-93:19.]
11 Tekulve understood that he was certifying that the statements were accurate and
12 that they disclosed properly the activities for the quarter. [Ex. 6 (Tekulve Depo.)
13 93:20-93:22, 93:24-94:5.]

14 63. Jensen understood that he was representing that he had reviewed the entire
15 document when he signed the certifications. [Ex. 5 (Jensen Depo.) 72:24-73:10.]

16 64. These certifications were false in that the Form 10-Q contained
17 material misrepresentations and omissions of material fact regarding Basin's
18 quarterly revenues, and did not fairly represent Basin's financial condition, and
19 Jensen and Tekulve had not disclosed to either Basin's auditors or its audit
20 committee their fraud in causing the improper revenue recognition.

21 (3) **The Defendants Made False And Misleading**
22 **Statements In The Q1 2006 Analyst Conference**
23 **Call**

24 65. At about 1:30 p.m. Pacific Time on June 26, 2006, Jensen and
25 Tekulve participated on behalf of Basin in an analyst conference call, for which
26 Tekulve had drafted the script and approved the final version. [Ex. 32 (Depo. Ex.
27 976, call transcript ("Tr.")); Ex. 5 (Jensen Depo.) 79:1-79:10; Ex. 6 (Tekulve
28 Depo.) 95:17-95:24.] Tekulve understood that analysts would rely on statements

made by Basin management during analyst conference calls, and further understood that members of the public could listen to the calls . [Ex. 6 (Tekulve Depo.) 95:25-97:10.] Among other representations, Jensen stated that:

Our first quarter 2006 Form 10-Q filed today with the SEC was the first official quarterly filing since the public offering. We have seen a 311% increase in revenues this quarter, a total of \$3.7 million, reflecting a growth both in system sales and contract revenues.

System sales for the quarter grew by over 450% from the same quarter in the prior year.

[Ex. 32 at 01202646. *See also* Ex. 5 (Jensen Depo.) 79:15-80:1, 80:3-80:5.]

66. Jensen reviewed the text of his remarks, which were partially prepared and then approved by Tekulve, before each earnings conference call in which he participated. [Ex. 5 (Jensen Depo.) 80:6-80:23; Ex. 6 (Tekulve Depo.) 95:7-95:9, 95:17-95:24.] Jensen's above statement was materially false and misleading because \$1.5 million of the revenues, or 41%, were revenues that were improperly recognized pursuant to the transaction with Opus Trust. Jensen similarly falsely represented that "Our gross profits grew significantly, about 267% over the prior year quarter," when in fact gross profits for the period had significantly declined, if the revenue improperly recognized from the Opus Trust transaction was excluded, and gross profits were overstated by 313%. [Boudreau Declaration ¶ 3 (chart).]

3. The Defendants Materially Overstated Basin's Year-To-Date Financial Results In Basin's Second Quarter 2006 Form 10-Q

a) Jensen And Tekulve Continued To Make Misrepresentations And Omissions Of Material Fact Regarding The Opus Deal To Basin's Auditors

67. On August 14, 2006, Jensen and Tekulve each signed a management representation letter to SingerLewak, Basin's auditors in connection with

1 SingerLewak's review of Basin's second quarter and year-to-date 2006 financial
2 statements. [Ex. 5 (Jensen Depo.) 86:20-87:10; Ex. 6 (Tekulve Depo.) 97:22-98:1; Ex.
3 34 (Depo. Ex. 637 (letter) at 5.] Hansen also signed the letter. [Ex. 34 (letter) at 6.]

4 68. Jensen and Tekulve confirmed in the letter "that we are responsible
5 for the fair presentation of the interim financial information in conformity with
6 accounting principles generally accepted in the United States of America and Rule
7 10-01(a)-(c) of Regulation S-X." [Ex. 3 (Tekulve Answer) ¶ 30; Ex. 34 (Depo. Ex.
8 637 (letter)) at 1.] They further represented in this management representation
9 letter, among other things, that:

- 10 a. The interim financial information was presented in accordance
11 with GAAP applicable to interim financial information applied
12 on a basis substantially consistent with the same period in the
13 prior year, the immediately preceding quarter and the prior
14 fiscal year [Ex. 34 at 1 ¶ 1];
- 15 b. They had made available to SingerLewak all financial records
16 and related data [Ex. 34 at 1 ¶ 2.a.];
- 17 c. They had no knowledge of any fraud or suspected fraud affecting
18 the Company involving management [Ex. 34 at 2 ¶ 6.a.];
- 19 d. There were no material transactions that had not been properly
20 recorded in the accounting records underlying the interim
21 financial information [Ex. 34 at 2 ¶ 12]; and
- 22 e. No events or transactions other than those disclosed in the
23 interim financial information had occurred subsequent to June
24 30, 2006 that would require adjustment to, or disclosure in, the
25 interim financial information [Ex. 34 at 3].

26 [See also Ex. 3 (Tekulve Answer) ¶ 30.] Each of these representations was false
27 because recognition of revenue from the Opus Trust transaction did not comply
28 with GAAP, and these revenues, constituting 17% of Basin's year-to-date

1 revenues, were material to Basin's financial statements included in its second
2 quarter financial statements.

3 **b) The Defendants Issued A False Earnings Release**

4 69. On August 14, 2006, Tekulve caused Basin to issue its second quarter
5 2006 earnings release. [Ex. 1 (Complaint) ¶ 29; Ex. 2 (Jensen Answer) ¶ 29; Ex. 3
6 (Tekulve Answer) ¶ 29; Ex. 6 (Tekulve Depo.) 98:6-98:14.] Tekulve caused it to be
7 filed with the Commission on Form 8-K and signed the filing. [Ex. 3 (Tekulve
8 Answer) ¶ 29; Ex. 33 (Depo. Ex. 977) Form 8-K; Ex. 6 (Tekulve Depo.) 98:6-98:14).]

9 70. The headline on the earnings press release stated in relevant part:
10 **"Quarterly Revenues Increase to \$5 Million, Gross Profit to \$1.4 Million."** [Ex.
11 3 (Tekulve Answer) ¶ 29; Ex. 33 (8-K) at 01645538.] In the press release, it is
12 represented that:

13 Revenues increased by 200% to \$8.7 million for the six months
14 ended June 30, 2006 compared to \$2.9 million for the same period
15 in 2005. Revenue from . . . system sales. . . continue to increase
16 compared to the prior year as a result of growth in placement of
17 our groundwater treatment systems.

18
19 Gross profit for the six months ended June 30, 2006 was \$2.5
20 million compared to \$0.9 million for the same period in 2005.
21 [Ex. 33 (8-K) at 01645538; Ex. 3 (Tekulve Answer) ¶ 29]

22 71. Jensen is quoted in the release as saying "We are pleased with our second
23 quarter results which reflect continued growth in all areas of our business. . . ." [Ex.
24 33 (8-K) at 01645539; Ex. 3 (Tekulve Answer) ¶ 29.] It was Jensen's practice to
25 review his comments set forth in the earnings release before the release was issued.
26 [Ex. 5 (Jensen Depo.) 87:15-88:9]

27 72. The representations in the release were false and misleading because
28 they did not disclose that \$1.5 million of the \$8.7 million in revenues for the first

1 six months of 2006 was the revenue that was improperly recognized from the Opus
2 Trust transaction.

3 c) **The Defendants Caused The Filing Of A False Second**
4 **Quarter 2006 10-Q, And Falsely Certified Its**
5 **Accuracy**

6 73. Also on August 14, 2006, Jensen and Tekulve caused Basin to file
7 with the Commission its quarterly report on Form 10-Q, for its second quarter
8 2006 (“Q2 2006”) ended June 30, 2006. [Ex. 1 (Complaint) ¶ 31; Ex. 2 (Jensen
9 Answer) ¶ 31; Ex. 3 (Tekulve Answer) ¶ 31; Ex. 35 (Depo. Ex. 978 (Form 10-Q)).]
10 Jensen read and signed the Form 10-Q before it was filed, and Tekulve signed the
11 Form 10-Q as Basin’s CFO. [Ex. 1 (Complaint) ¶ 31; Ex. 2 (Jensen Answer) ¶ 31;
12 Ex. 3 (Tekulve Answer) ¶ 31; Ex. 5 (Jensen Depo.) 88:14-88:20.] Among other
13 results, Basin’s Form 10-Q reported system sales of \$7,258,000 for the first six
14 months of 2006 and total revenues of \$8,666,000 for that period. [Ex. 3 (Tekulve
15 Answer) ¶ 31.] These system sales and revenues included the \$1,500,000 in
16 revenue purportedly earned from a sale of systems to Opus Trust. [Ex. 3 (Tekulve
17 Answer) ¶ 31.] Basin’s Form 10-Q does not disclose that 17% of its purported
18 revenues were derived from a purported sale to a single customer for which
19 revenues were not in fact properly recognized. [Ex. 3 (Tekulve Answer) ¶ 31.] As
20 a result of the improper recognition of the revenue, Basin’s year-to-date revenues
21 were overstated by 18%, its system sales were overstated by 23%, and its gross
22 profits were overstated by 44%. [See Boudreau Declaration ¶ 3 (chart).]

23 74. Jensen understood that the Q2 2006 Form 10-Q, to the extent it
24 discussed revenues for the year-to-date, included revenues from the transaction
25 with Benowitz and Opus Trust. [Ex. 5 (Jensen Depo.) 89:7-89:12.]

26 75. On or about August 14, 2006, Jensen and Tekulve each certified,
27 among other things, with regard to the Form 10-Q, that:

28 a. He had reviewed the Form 10-Q;

- 1 b. Based on his knowledge, the Form 10-Q did not contain any
2 untrue statement of material fact or omit to state a material fact
3 necessary to make the statements made, in light of the
4 circumstances under which they were made, not misleading
5 with respect to the period covered by the report;
- 6 c. Based on his knowledge, the financial statements, and other
7 financial information included in the report fairly presented in
8 all material respects the financial condition, results of
9 operations and cash flows of Basin as of and for the periods
10 presented in the report; and
- 11 d. He had disclosed to Basin's auditors and the audit committee of
12 Basin's Board of Directors any fraud that involved company
13 management.

14 [Ex. 1 (Complaint) ¶ 32; Ex. 2 (Jensen Answer) ¶ 32; Ex. 3 (Tekulve Answer) ¶
15 32; Ex. 35 (10-Q) at 01645531-34; Ex. 5 (Jensen Depo.) 88:21-89:4 & 89:6; Ex. 6
16 (Tekulve Depo.) 99:2-99:9.] These certifications were false in that the Form 10-Q
17 contained material misrepresentations and omissions of material fact regarding
18 Basin's year-to-date revenues, and did not fairly represent Basin's financial
19 condition, and Jensen and Tekulve had not disclosed to either Basin's auditors or
20 its audit committee their fraud in causing the improper revenue recognition.

21 **d) The Defendants Made False And Misleading**
22 **Statements In The Q2 2006 Analyst Conference Call**

23 76. At about 1:30 p.m. Pacific Time on August 14, 2006, Jensen and
24 Tekulve participated on behalf of Basin in an analyst conference call, for which
25 Tekulve had drafted the script that morning and approved the final version of it.
26 [Ex. 1 (Complaint) ¶ 33; Ex. 2 (Jensen Answer) ¶ 33; Ex. 3 (Tekulve Answer) ¶ 33
27 (admitting he drafted "some of" the script); Ex. 36 (Depo. Ex. 979 (call Tr.)); Ex. 5
28 (Jensen Depo.) 89:17-89:23; Ex. 6 (Tekulve Depo.) 95:2-95:24, 99:10-99:28.]

1 77. When Jensen made statements about revenues in earnings conference
2 calls, he understood that revenues were “one of the standard metrics to mention in
3 an earnings call.” [Ex. 5 (Jensen Depo.) 90:15-90:17, 90:20-90:22.] In the Q2
4 2006 analyst conference call, Jensen represented that: “for the six months of 2006,
5 revenues grew to \$8.7 million compared to \$2.9 million for the same period in
6 2005, a 200% increase.” [Ex. 3 (Tekulve Answer) ¶ 33; Ex. 5 (Jensen Depo.)
7 89:24-90:14; Ex. 36 (Tr.) at 00622637.] This statement was materially false and
8 misleading because \$1.5 million of the revenues, or 17%, were revenues that were
9 improperly recognized pursuant to the transaction with Opus Trust and Opus year-
10 to-date revenues were overstated by 18%. [Boudreau Declaration ¶ 3 (chart).]

11 78. Jensen similarly falsely represented that “Gross profits for the six
12 month period grew by 177% to 2.5 million compared to 0.9 million in the same
13 period ’05,” when in fact gross profits were overstated by 44%. [See Ex. 36 (Tr.) at
14 00622638; Boudreau Declaration ¶ 3 (chart).] Jensen understood that gross profits
15 were also a standard metric he discussed in earnings conference calls. [Ex. 5 (Jensen
16 Depo.) 90:25-91:7] He also understood that the revenues and gross profits for the
17 six month period ended June 30, 2006, discussed in the conference call included the
18 transaction with Benowitz and Opus Trust. [Ex. 5 (Jensen Depo.) 91:8-91:13.]

19 **4. The Defendants Materially Overstated Basin’s Q3 2006**
20 **Revenues By Recognizing \$451,000 On A Contingent Sale**
21 **Of Systems Basin Never Shipped And Continued To**
22 **Overstate Basin’s Year-To-Date Results**

23 **a) Jensen Negotiated A Purported Deal With Thermax**
24 **Improperly Based On A Conditional Purchase Order**
25 **Of Which Tekulve Was Aware**

26 79. In 2005, James Sabzali (“Sabzali”), general manager of the chemical
27 division of Thermax, Inc., contacted Jensen on behalf of Thermax. [Ex. 1
28 (Complaint) ¶ 34; Ex. 2 (Jensen Answer) ¶ 34.] Sabzali told Jensen that Thermax

1 had a client in Venezuela, PDVSA, for which Thermax was interested in
2 purchasing Basin units. [Ex. 1 (Complaint) ¶ 34; Ex. 2 (Jensen Answer) ¶ 34.]

3 80. After protracted negotiations during which Jensen repeatedly pressed
4 Sabzali for Thermax to send him a purchase order, on July 5, 2006, Sabzali sent an
5 email to Jensen and others at Basin stating that PDVSA had verbally committed to
6 buying a softening system from Thermax; that once Thermax received a purchase
7 order and first partial payment from PDVSA which was expected in late August, it
8 would issue a purchase order to Basin, which it expected to do in late September;
9 and that it anticipated shipment by Basin would be needed in early January 2007.
10 [Ex. 37 (Sabzali Depo.) 53:4-53:22; Ex. 38 (Depo. Ex. 26 (email chain); *see also*
11 Ex. 14 (Jensen Test.) 85:13-86:2.]

12 81. On July 7, 2006, Jensen forwarded the July 5 email from Thermax to
13 Tekulve, whom he had periodically informed regarding the negotiations with
14 Thermax. [Ex. 38 (email); Ex. 14 (Jensen Test.) 87:18-88:10; *see also* Ex. 1
15 (Complaint) ¶ 34; Ex. 2 (Jensen Answer) ¶ 34.] Jensen did so because he typically
16 tried to keep Tekulve aware of what was going on as Thermax was an unusual
17 project for Basin, and “it was an endless string of communications from [Sabzali],
18 promises that he did not keep.” [Ex. 14 (Jensen Test.) 87:22-88:10; Ex. 6 (Tekulve
19 Depo.) 101:25-102:6 (Tekulve was aware of Jensen’s discussions with Thermax).]

20 82. On August 18, 2006, Patrick Kelly (“Kelly”), Basin’s head of
21 manufacturing, reminded Jensen in an email that, with regard to the potential order
22 from Thermax, Basin had done no engineering work on modifying its units for
23 ocean travel, that “At best all we would be able to accomplish in the way of
24 revenue recognition in Q3, if an order came in Q3, would be parts delivery and
25 some subassembly efforts.” [Ex. 1 (Complaint) ¶ 35; Ex. 2 (Jensen Answer) ¶ 35;
26 *see also* Ex. 3 (Tekulve Answer) ¶ 35.]

27 83. Jensen repeatedly pressed Thermax for a purchase order, informing
28 Sabzali that Basin needed the purchase order in September before the end of the

1 quarter because it would be a significant component to Basin's quarterly reported
2 financial information. [Ex. 1 (Complaint) ¶ 36; Ex. 2 (Jensen Answer) ¶ 36
3 (admitting Jensen asked Thermax to submit a purchase order); Ex. 14 (Jensen
4 Test.) 83:1-84:5.]

5 84. On or about September 25, 2006, Sabzali emailed a memorandum on
6 behalf of Thermax to Jensen "RE: Purchase Order for PDVSA Softening System,"
7 which set forth several "caveats" that would apply to the purchase order Thermax
8 "will be sending Basin Water later this month." [Ex. 1 (Complaint) ¶ 37; Ex. 2
9 (Jensen Answer) ¶ 37 (admitting Sabzali sent Jensen a document with the above title
10 in September); Ex. 5 (Jensen Depo.) 97:10-98:4; Ex. 39 (Depo. Ex. 512, email and
11 memo).] These caveats included that the purchase order from Thermax "is predicated
12 on Thermax Inc. receiving a similar purchase order from PDVSA," and that if
13 PDVSA failed to issue a purchase order to Thermax by November 30, Thermax's
14 purchase order to Basin would be canceled. [Ex. 39 at 01642153 ¶¶ 1 & 2.]

15 85. Jensen was angered by the "caveat" that Thermax would have to
16 receive a purchase order from PDVSA before issuing a purchase order to Basin; he
17 therefore called Sabzali and told him this caveat was "unacceptable" and that such a
18 purchase order is "absolutely not valid at all," and that he expected Thermax to send
19 a purchase order without that contingency. [Ex. 1 (Complaint) ¶ 38; Ex. 2 (Jensen
20 Answer) ¶ 38 (admitting that Jensen informed Sabzali that Basin "would not accept
21 the proposed caveats to Thermax' purchase order and that [Basin] would not agree to
22 a purchase order containing such contingent terms"); Ex. 14 (Jensen Test.) 83:10-
23 84:5; *see also* Ex. 5 (Jensen Depo.) 101:4-101:16, 101:22-102:13.]

24 86. Jensen's concern was that the letter from Thermax wasn't valid until
25 Thermax received a purchase order from someone else (PDVSA). [Ex. 5 (Jensen Depo.)
26 12:21-13:6, 101:4-101:16, 101:22-102:13.] It was "clear" to Jensen that the Thermax
27 letter "wasn't something that would do us any good, because we certainly wouldn't do
28 anything without a valid purchase order. And I didn't believe that [it] was valid,"

1 because he understood “it was not a valid order if it was contingent.” [*Id.* 13:6-13:13.]

2 87. On September 28, 2006, Jensen received by email a purchase order
3 from Thermax. [Ex. 1 (Complaint) ¶ 39; Ex. 2 (Jensen Answer) ¶ 39; *see also* Ex. 3
4 (Tekulve Answer) ¶ 39; Ex. 5 (Jensen Depo.) 102:14-102:22; Ex. 40 (Depo. Ex. 500
5 (purchase order).] The purchase order stated that it was subject to terms and
6 conditions stated on Addendum “A.” [Ex. 1 (Complaint) ¶ 39; Ex. 2 (Jensen
7 Answer) ¶ 39; *see also* Ex. 3 (Tekulve Answer) ¶ 39; Ex. 500 at 01643053.] That
8 Addendum contained the provision that the date of shipment and terms and
9 conditions were “TBA,” which Jensen understood meant “to be advised.” [Ex. 14
10 (Jensen Test.) 101:12-101:17.] Additionally, with respect to the terms and
11 conditions, the purchase order provided that it was “Agreed that the T&C to Basin
12 will reflect the T&Cs on PDVSA’s PO [Purchase Order] to Thermax Inc.,” which
13 Jensen understood to be similar, if not identical, to the prior memorandum he had
14 rejected. [Ex. 14 (Jensen Test.) 109:25-110:5; Ex. 40 (purchase order); Ex. 41
15 (Depo. Ex. 30) (email and purchase order).]

16 88. Jensen nevertheless had no discussions and raised no concerns about
17 the purchase order with anyone at Basin; nor did he further discuss this condition
18 with Thermax. [Ex. 14 (Jensen Test.) 110:10-110:14.] Nor did Jensen ask to see the
19 PDVSA purchase order, even though he understood that the terms and conditions
20 were part of the deal, and that those terms and conditions were reflected in a
21 purchase order from PDVSA. [Ex. 5 (Jensen Depo.) 103:23-104:8, 104:18-105:6.]
22 Nor did Jensen, or anyone else to his knowledge at Basin, ever communicate directly
23 with PDVSA. [Ex. 5 (Jensen Depo.) 127:16-127:19.] Indeed, Jensen did not know
24 if the PDVSA purchase order had been issued. [Ex. 5 (Jensen Depo.) 104:23-105:2
25 (“if [the purchase order] was issued, I [Jensen] haven’t seen it.”).]

26 89. Also on September 28, 2006, Tekulve received the Thermax purchase
27 order including Addendum A, and forwarded it by email to Hansen, understanding
28 that it was subject to the terms and conditions set forth in Addendum A. [*See* Ex. 3

(Tekulve Answer) ¶ 40; Ex. 6 (Tekulve Depo.) 101:10-101:24; Ex. 15 (Tekulve Test.) 95:12-96:2, 96:23-97:1; Ex. 41 (email and purchase order).]

90. Notwithstanding that the Thermax purchase order stated that the terms and conditions were reflected on a purchase order from PDVSA, Tekulve never asked Thermax for a copy of the PDVSA purchase order. [Ex. 6 (Tekulve Depo.) 106:1-106:3] Tekulve was aware, however, that Kelly was asking for this information from him and/or Jensen, so that he could prepare the unit, including for shipping. [Ex. 6 (Tekulve Depo.) 106:4-107:8, 107:24.]

91. Subsequently, Tekulve spoke with Sabzali, and Sabzali told him that he had not received a purchase order yet from PDVSA. [Ex. 6 (Tekulve Depo.) 107:25-108:13.] Sabzali told Tekulve he had not received the PDVSA purchase order prior to Basin filing its Form 10-Q for the third quarter of 2006, ended September 30, 2006. [Ex. 6 (Tekulve Depo.) 108:14-108:16.] Tekulve never saw a purchase order from PDVSA. [Ex. 6 (Tekulve Depo.) 105:5-105:7.]

**b) Jensen And Tekulve Cause Revenue To Be
Improperly Recognized On The Thermax Deal**

92. Notwithstanding their understanding that: (1) revenue could not be recognized on a conditional purchase order; and (2) the Thermax purchase order was conditioned on the terms and conditions of a PDVSA order, and Tekulve's additional understanding that the PDVSA order had not been issued at the time that the Thermax order was presented to Basin, \$451,000 in revenue was recognized by Basin for the Thermax transaction. [Ex. 3 (Tekulve Answer) ¶ 42 (admitting figures included \$451,000 in revenue from the Thermax transaction); Ex. 5 (Jensen Depo.) 106:17-106:21 (Jensen was aware that about \$400,000 in revenue was recognized on the Thermax purchase order).]

93. Thermax never received a purchase order from PDVSA, and never made any payments to Basin, and Basin never in fact shipped any units to Thermax pursuant to the September 28, 2006, purchase order, notwithstanding that Jensen

1 was responsible for keeping in contact with Thermax in order to obtain a shipping
2 date from them. [Ex. 3 (Tekulve Answer) ¶ 46 (admitting that Basin did not
3 receive any payments from Thermax, and did not ship any units to Thermax
4 pursuant to the September 28, 2006, purchase order; Ex. 5 (Jensen Depo.) 130:10-
5 130:13; 132:15-132:19 (admitting Thermax never made any payments on the
6 purchase order, and Basin never shipped any units to Thermax).]

7 94. As a result, in addition to there being no persuasive evidence of an
8 arrangement between the parties or reasonable assurance of collectability, no
9 delivery occurred. Three of the four requirements for revenue recognition were
10 accordingly not met. [See Boudreau Declaration, Ex. 2 (SAB 104).]

11 c) **Jensen And Tekulve Made Misrepresentations And**
12 **Omissions Of Material Fact Regarding The Thermax**
13 **Deal To Basin's Auditors**

14 95. On November 14, 2006, Jensen and Tekulve each reviewed and
15 signed a management representation letter to SingerLewak, Basin's auditors. [Ex.
16 5 (Jensen Depo.) 132:22-133:9; Ex. 6 (Tekulve Depo.) 118:20-119:3, Ex. 42
17 (Depo. Ex. 638 (letter)) at 4.] Hansen also signed the letter. [Ex. 42 (letter) at 5.]

18 96. In the letter, Jensen and Tekulve confirmed "that we are responsible
19 for the fair presentation of the interim financial information in conformity with
20 accounting principles generally accepted in the United States of America and Rule
21 10-01(a)-(c) of Regulation S-X." [Ex. 42 at 1.] They further represented in this
22 management representation letter, among other things, that:

23 a. The interim financial information was presented in accordance
24 with GAAP applicable to interim financial information applied
25 on a basis substantially consistent with the same period in the
26 prior year, the immediately preceding quarter and the prior
27 fiscal year [Ex. 42 at 1 ¶ 1];

28 b. They had made available to SingerLewak all financial records

1 and related data [Ex. 42 at 1 ¶ 2.a.];

2 c. They had no knowledge of any fraud or suspected fraud
3 affecting the Company [Ex.42 at 2 ¶ 7.];

4 d. There were no material transactions that had not been properly
5 recorded in the accounting records underlying the interim
6 financial information [Ex. 42 at 2 ¶ 12]; and

7 e. No events or transactions had occurred subsequent to
8 September 30, 2006 that would require adjustment to, or
9 disclosure in, the interim financial information [Ex. 42 at 3].

10 Each of these representations was false because recognition of revenue from the
11 Opus Trust and Thermax transactions did not comply with GAAP, and these
12 revenues were material to Basin's year-to-date financial statements included in its
13 third quarter financial statements.

14 d) **Jensen And Tekulve Caused Basin's Materially False**
15 **Financial Results To Be Disseminated To The**
16 **Investing Public**

17 (1) **The Defendants Issued A False Earnings Release**

18 97. On November 14, 2006, Tekulve caused Basin to issue its third
19 quarter 2006 earnings release. [Ex. 1 (Complaint) ¶ 41; Ex. 2 (Jensen Answer) ¶
20 41; Ex. 3 (Tekulve Answer) ¶ 41; Ex. 43 (Depo Ex. 981 (8-K)).] Tekulve caused it
21 to be filed with the Commission on Form 8-K and signed the filing. [See Ex. 3
22 (Tekulve Answer) ¶ 41.]

23 98. The headline on the earnings press release stated in relevant part:
24 **“Quarterly Revenues at \$4.8 Million, Nine-Month Revenues Increase 75%**
25 **from 2005 to \$13.5 Million.”** [Ex. 3 (Tekulve Answer) ¶ 41; Ex. 43.] In the press
26 release, it is represented that:

27 For the third quarter of 2006, revenues of \$4.8 million were a slight
28 improvement over the third quarter of 2005. Meanwhile 2006 nine-

1 month revenues increased by 75% to \$13.5 million compared to \$7.7
2 million for the first nine months of 2005. System sales revenues for
3 the third quarter 2006 were \$3.9 million compared to \$4.2 million in
4 the same period in 2005.

5 [Ex. 3 (Tekulve Answer) ¶ 41; Ex. 43.] The above representations were false and
6 misleading because they did not disclose that \$451,000, or 9%, of the \$4.8 million
7 in third quarter revenue was revenue improperly recognized from the Thermax
8 transaction, and that almost \$2 million of the \$13.5 million in revenues for the first
9 nine months of 2006 was revenue that was improperly recognized from the Opus
10 Trust and Thermax transactions (\$1.5 million and \$451,000 respectively). Indeed,
11 if just the Thermax revenues had not been included, third quarter revenues would
12 not have been a “slight improvement” over the third quarter of 2005, as falsely
13 suggested by the headline on the release; instead, they would have been less than
14 the same period for the prior year. [Ex. 6 (Tekulve Depo.) 122:1-123:7.]

15 (2) **The Defendants Caused The Filing Of A False**
16 **Third Quarter 2006 10-Q, And Falsely Certified**
17 **Its Accuracy**

18 99. Also on November 14, 2006, Jensen and Tekulve caused Basin to file
19 with the Commission its quarterly report on Form 10-Q, for its third quarter 2006
20 (“Q3 2006”) ended September 30, 2006. [Ex. 1 (Complaint) ¶ 42; Ex. 2 (Jensen
21 Answer) ¶ 42; Ex. 3 (Tekulve Answer) ¶ 42; Ex. 44 (Depo. Ex. 627 (10-Q)).]
22 Jensen read the Form 10-Q before it was filed, and Tekulve reviewed it at length
23 and signed the Form 10-Q as Basin’s CFO. [Ex. 1 (Complaint) ¶ 42; Ex. 2 (Jensen
24 Answer) ¶ 42; Ex. 6 (Tekulve Depo.) 120:1-120:8.] Among other results, Basin’s
25 Form 10-Q reported quarterly system sales of \$3,936,000 and total revenues of
26 \$4,846,000. [Ex. 3 (Tekulve Answer) ¶ 42.] These system sales and revenues
27 included recognition of \$451,000 in revenue purportedly earned from the sale of
28 systems to Thermax which was not in fact properly recognized. [Ex. 3 (Tekulve

1 Answer) ¶ 42 (admitting figures included \$451,000 in revenue from the Thermax
2 transaction); Ex. 5 (Jensen Depo.) 106:17-106:21 (Jensen was aware that about
3 \$400,000 in revenue was recognized on the Thermax purchase order).]

4 100. Additionally, the Form 10-Q reports \$11,194,000 in system sales and
5 \$13,512,000 in total revenue for the first nine months of 2006. [Ex. 3 (Tekulve
6 Answer) ¶ 43.] These systems sales and revenues included almost \$2 million in
7 revenues improperly recognized from the Opus Trust (\$1.5 million) and Thermax
8 (\$451,000) transactions. [See Ex. 3 (Tekulve Answer) ¶ 43.]

9 101. On or about November 14, 2006, Jensen and Tekulve each certified,
10 among other things, with regard to the Form 10-Q, that:

- 11 a. He had reviewed the Form 10-Q;
- 12 b. Based on his knowledge, the Form 10-Q did not contain any
13 untrue statement of material fact or omit to state a material fact
14 necessary to make the statements made, in light of the
15 circumstances under which they were made, not misleading
16 with respect to the period covered by the report;
- 17 c. Based on his knowledge, the financial statements, and other
18 financial information included in the report fairly presented in
19 all material respects the financial condition, results of
20 operations and cash flows of Basin as of and for the periods
21 presented in the report; and
- 22 d. He had disclosed to Basin's auditors and the audit committee of
23 Basin's Board of Directors any fraud that involved company
24 management.

25 [Ex. 1 (Complaint) ¶ 44; Ex. 2 (Jensen Answer) ¶ 44; Ex. 3 (Tekulve Answer) ¶
26 44; Ex. 44 at 01645607-10.] These certifications were false in that the Form 10-Q
27 contained material misrepresentations and omissions of material fact regarding
28 Basin's quarterly and year-to-date revenues, and did not fairly represent Basin's

1 financial condition, and Jensen and Tekulve had not disclosed to either Basin's
2 auditors or its audit committee their fraud in causing the improper revenue
3 recognition in connection with the Opus Trust and Thermax transactions.

4 (3) **The Defendants Made False And Misleading**
5 **Statements In The Q3 2006 Analyst Conference**
6 **Call**

7 102. At about 1:30 p.m. Pacific Time on November 14, 2006, Jensen and
8 Tekulve participated on behalf of Basin in an analyst conference call, for which
9 Tekulve had drafted the script that morning, the final version of which he approved.
10 [Ex. 1 (Complaint) ¶ 45; Ex. 2 (Jensen Answer) ¶ 45; Ex. 3 (Tekulve Answer) ¶ 45
11 (admitting he drafted "some of" the script; Ex. 6 (Tekulve Depo.) 95:2-95:24.]

12 103. Among other representations, Jensen represented that "our revenues of
13 \$4.8 million were a slight improvement over the prior quarter. Meanwhile, nine
14 months 2006 revenues increased by 75% to \$13.5 million compared to \$7.7 million
15 for the nine months of 2005." [Ex. 5 (Jensen Depo.) 138:11-139:4, 139:7-139:10;
16 Ex. 6 (Tekulve Depo.) 123:8-123:21; Ex. 45 (Depo. Ex. 982 (call Tr.)) at 00248747.]
17 This statement was materially false and misleading because \$1.5 million of the
18 revenues and \$451,000, totaling 13%, were revenues that were improperly
19 recognized pursuant to the transactions with Opus Trust and Thermax, respectively,
20 and the company's third quarter revenues had, in fact, declined, rather than made a
21 slight improvement over the prior year third quarter. In fact, the Defendants had
22 caused Basin's quarterly and year-to-date revenues to be overstated by 10% and
23 15%, respectively; its quarterly and year-to-date system sales to be overstated by
24 13% and 19%, respectively; and its quarterly and year-to-date gross profits to be
25 overstated by 260% and 128%, respectively. [See Boudreau Declaration ¶ 3 (chart).]

26 ///

27 ///

28 ///

1 **5. The Defendants Materially Overstated Basin’s FY 2006**
2 **Revenues**

3 a) **Jensen And Tekulve Continued To Make**
4 **Misrepresentations And Omissions Of Material Fact**
5 **Regarding The Opus Trust And Thermax Deals To**
6 **Basin’s Auditors**

7 104. On or about March 6, 2007, Tekulve transmitted to the auditors for
8 inclusion in their 2006 audit file, a memorandum entitled “Analysis of Bad Debt
9 Reserve as of 12/31/06,” which he had prepared. [Ex. 15 (Tekulve Test.) 121:13-
10 121:21; Ex. 54 (Depo. Ex. 206 (Draft Memo)); Ex. 29 (Moore Depo.) 81:8-81:14,
11 82:13-82:14, 82:17, 82:25-83:3; Ex. 74 (Depo. Ex. 867) (memo and cover email to
12 SingerLewak)] That memorandum represented that, with regard to the purported
13 Thermax transaction, “Management expects full collection of the entire contract
14 amount. Accordingly, management does not believe that any specific bad debt
15 reserve is necessary as of 12/31/06.” [Ex. 54 at 0002640; Ex. 74 at 00080051.]
16 Tekulve made this representation notwithstanding that he knew that the Thermax
17 order was contingent upon the terms and conditions of an order to Thermax from
18 PDVSA, which order he had never seen, and notwithstanding that no payments or
19 shipping instructions had been received by Basin since it received the purported
20 purchase order from Thermax over five months before, on September 28, 2006.

21 105. On March 30, 2007, Jensen and Tekulve each signed a management
22 representation letter to SingerLewak, Basin’s auditors. [Ex. 1 (Complaint) ¶ 50;
23 Ex. 3 (Tekulve Answer) ¶ 50; *see also* Ex. 2 (Jensen Answer) ¶ 50; Ex. 46 (Depo.
24 Ex. 639 (letter)) at 7 & 8.] Hansen also signed this letter. [Ex. 46 at 9.]

25 106. In the letter, Jensen and Tekulve confirmed “that we are responsible
26 for the fair presentation of the interim financial information in conformity with
27 accounting principles generally accepted in the United States of America and Rule
28 10-01(a)-(c) of Regulation S-X.” [Ex. 1 (Complaint) ¶ 50; Ex. 3 (Tekulve Answer)

¶ 50; Ex. 46 at 1.] They further represented in this Management Representation Letter, among other things, that:

- a. The financial statements were fairly presented in conformity with GAAP [Ex. 46 at 1 ¶ 1];
- b. They had made available to SingerLewak all financial records and related data [Ex. 46 at 1 ¶ 2.a.];
- c. They had no knowledge of any fraud or suspected fraud affecting the Company involving management [Ex. 46 at 1 ¶ 3.a.];
- d. There were no material transactions that had not been properly recorded in the accounting records underlying the financial statements [Ex. 46 at 3 ¶ 10.r.]; and
- e. The Company had properly recorded all revenue transactions in accordance with revenue recognition policies, including under the percentage-of-completion method [Ex. 46 at 4 ¶ 20].

[See also Ex. 3 (Tekulve Answer) ¶ 50.]

107. Each of these representations was false because recognition of revenue from the Opus Trust and Thermax transactions did not comply with GAAP, and these revenues were material to Basin's financial statements.

b) The Defendants Issued A False Earnings Release

108. On the morning of March 29, 2007, Tekulve caused Basin to issue its Fiscal Year 2006 earnings release. [Ex. 1 (Complaint) ¶ 47; Ex. 2 (Jensen Answer) ¶ 47; Ex. 3 (Tekulve Answer) ¶ 47; Ex. 47 (Depo. Ex. 983 (Form 8-K)).] Tekulve caused it to be filed with the Commission on Form 8-K and signed the filing. [Ex. 3 (Tekulve Answer) ¶ 47 (admitting he signed the filing); Ex. 6 (Tekulve Depo.) 125:3-125:8 (admitting he caused it to be filed).]

109. The headline on the earnings press release stated in relevant part: **"Twelve Month Revenues Increase 40% from 2005 to \$17.1 Million"** [Ex. 3

1 (Tekulve Answer) ¶ 47.] In the press release, it is represented that:

2 For the year ended 2006, revenues increased by 40% to \$17.1 million
3 compared to \$12.2 million for the year 2005. For the year, system
4 sales revenues were \$13.9 million, compared to \$10.0 million in the
5 same twelve-month period in 2005.

6 [Ex. 3 (Tekulve Answer) ¶ 47; Ex. 6 (Tekulve Depo.) 124:2-124:21.] Jensen and
7 Tekulve knew these revenues included revenues from the improperly recorded Opus
8 Trust and Thermax transactions. [Ex. 5 (Jensen Depo.) 142:24-143:17; Ex. 6
9 (Tekulve Depo.) 124:2-124:18.] These items, also reported in the annual Form 10-K
10 discussed below, constituted material amounts of the revenue in 2006. [Ex. 6
11 (Tekulve Depo.) 124:19-124:21.]

12 110. In the release, Jensen is quoted as saying, among other things, that
13 “We have grown our revenues significantly this year.” [Ex. 3 (Tekulve Answer) ¶
14 47; Ex. 5 (Jensen Depo.) 142:6-142:12; Ex. 47 at 01645654.] These statements
15 were false and misleading in light of the fact that almost \$2 million – a material
16 portion – of the \$17.1 million in revenues was improperly recognized as a result of
17 the Opus Trust (\$1.5 million) and Thermax (\$451,000) transactions.

18 c) **The Defendants Made False And Misleading**
19 **Statements In The FY 2006 Analyst Conference Call**

20 111. At about 1:30 Pacific Time on March 29, 2007, that same day, Jensen
21 and Tekulve participated on behalf of Basin in an analyst conference call, together
22 with Stark, for which call Tekulve had drafted the script that morning, the final
23 version of which he approved. [Ex. 1 (Complaint) ¶ 48; Ex. 2 (Jensen Answer) ¶
24 48; Ex. 3 (Tekulve Answer) ¶ 48; Ex. 6 (Tekulve Depo.) 95:2-95:24.] Among other
25 representations, Jensen represented that “For the full year 2006, revenues increased
26 by 40% to 17.1 million in 2006 compared to \$12.2 million in 2005.” [Ex. 3
27 (Tekulve Answer) ¶ 48; Ex. 5 (Jensen Depo.) 142:20-143:10; Ex. 6 (Tekulve
28 Depo.) 125:9-125:15; Ex. 60 (Depo. Ex. 984 (call Tr.) 00248655.) This statement

1 was materially false and misleading because \$1.5 million and \$451,000, totaling
2 11% of Basin's FY 2006 revenue, were revenues that were improperly recognized
3 pursuant to the transactions with Opus Trust and Thermax, respectively.

4 112. Jensen also stated in the earnings conference call that "On our sales for
5 standard systems, we recorded revenues of \$8 million with a gross margin of 3.5
6 million, a gross profit margin of 44%. This is in line with our typical margins."

7 [Ex. 3 (Tekulve Answer) ¶ 49; Ex. 60 (Tr.) at 00248655.] This statement was
8 materially false and misleading because \$1.5 million and \$451,000, totaling 11% of
9 Basin's FY 2006 systems revenue, were revenues that were improperly recognized
10 pursuant to the transactions with Opus Trust and Thermax, respectively.

11 Accordingly, Basin's annual revenues were overstated by 13%, its annual system
12 sales were overstated by 16%, and its annual gross profits were overstated by 21%.

13 [See Boudreau Declaration ¶ 3 (chart).]

14 **d) The Defendants Caused To Be Filed A False And**
15 **Misleading Annual Report On Form 10-K**

16 113. On April 2, 2007, Jensen and Tekulve caused Basin to file with the
17 Commission its annual report on Form 10-K, for its fiscal year 2006 ("FY 2006")
18 ended December 31, 2006. [Ex. 1 (Complaint) ¶ 52; Ex. 2 (Jensen Answer) ¶ 52; Ex.
19 3 (Tekulve Answer) ¶ 52.] Jensen read the Form 10-K before it was filed, and Jensen
20 and Tekulve signed the Form 10-K. [Ex. 1 (Complaint) ¶ 52; Ex. 2 (Jensen Answer) ¶
21 52; *see also* Ex. 3 (Tekulve Answer) ¶ 52 (Tekulve admits he signed the Form 10-K.)

22 114. Basin's FY 2006 Form 10-K reported system sales of \$13,861,000 for
23 the year and \$17,114,000 in total revenues for the year. [Ex. 3 (Tekulve Answer) ¶
24 53; Ex. 48 (Depo. Ex. 630 (2006 Form 10-K) at 01645995.)] The Form 10-K
25 represents that "Revenues increased by \$4.9 million, or 40%, from 12.2 million in
26 2005 to \$17.1 million in 2006." [See Ex. 48 at 01645995.] However, Basin's
27 reported system sales and total revenues included the \$1,500,000 in revenue
28 purportedly earned from a sale of systems to Opus Trust in Q1 and \$451,000 in

1 revenue purportedly earned from a sale to Thermax in Q3, which amounts were
2 material to Basin's annual revenues. [Ex. 3 (Tekulve Answer) ¶ 53; Ex. 6
3 (Tekulve Depo.) 124:5-124:21.] Basin's Form 10-K does not disclose that 13% of
4 its purported system sales and 11% of its revenues were derived from the sales to
5 Opus Trust and Thermax, for which revenues were not in fact properly recognized.
6 [See Ex. 3 (Tekulve Answer) ¶ 53.] These amounts were material to Basin's
7 annual revenues. [Ex. 6 (Tekulve Depo.) 124:12-124:21.]

8 115. On or about April 2, 2007, Jensen and Tekulve each certified, among
9 other things, with regard to the Form 10-K, that:

- 10 a. He had reviewed the Form 10-K;
- 11 b. Based on his knowledge, the Form 10-K did not contain any
12 untrue statement of material fact or omit to state a material fact
13 necessary to make the statements made, in light of the
14 circumstances under which they were made, not misleading
15 with respect to the period covered by the report;
- 16 c. Based on his knowledge, the financial statements, and other
17 financial information included in the report fairly presented in
18 all material respects the financial condition, results of
19 operations and cash flows of Basin as of and for the periods
20 presented in the report; and
- 21 d. He had disclosed to Basin's auditors and the audit committee of
22 Basin's Board of Directors any fraud that involved company
23 management.

24 [Ex. 1 (Complaint) ¶ 54; Ex. 2 (Jensen Answer) ¶ 54; Ex. 3 (Tekulve Answer) ¶
25 54; Ex. 48 (Form 10-K) at 01646050-53.] These certifications were false in that
26 the Form 10-K contained material misrepresentations and omissions of material
27 fact regarding Basin's quarterly revenues, and did not fairly represent Basin's
28 financial condition, and Jensen and Tekulve had not disclosed to either Basin's

1 auditors or its audit committee their fraud in causing the improper revenue
2 recognition in connection with the Opus Trust and Thermax transactions.

3 **6. The Defendants Materially Overstated Basin's Q2 2007 And**
4 **Year-To-Date Revenues By Engaging In A Sham \$3.8**
5 **Million Sale To A Special Purpose Entity They Directly Or**
6 **Indirectly Caused To Be Created**

7 **a) The Defendants Caused Basin To Recognize Revenue**
8 **On A Sham Transaction**

9 116. Initially, in most cases Basin was placing units on customer sites and
10 signing long-term leases with those customers. [Ex. 1 (Complaint) ¶ 55; Ex. 2
11 (Jensen Answer) ¶ 55; *see also* Ex. 3 (Tekulve Answer) ¶ 55.] In or about early
12 2007, Basin began to engage in transactions pursuant to which it recognized
13 additional revenue by purporting to sell the systems rather than by leasing them.
14 Tekulve was primarily responsible for carrying out Basin's plan. [See Ex. 14
15 (Jensen Test.) 144:23-145:1; Ex. 15 (Tekulve Test.) 164:17-165:2.]

16 117. Basin paid a consultant, Charles Litt ("Litt"), to obtain financial
17 partners to facilitate purchase of units from Basin. [Ex. 3 (Tekulve Answer) ¶ 56
18 (admitting Litt, a consultant, helped facilitate transactions between Basin and other
19 companies); Ex. 15 (Tekulve Test.) 164:17-165:6.] Litt introduced Basin to CCH
20 Netherlands and its related companies ("CCH"), and to Lloyd Ward ("Ward"), a
21 Dallas, Texas attorney. [Ex. 15 (Tekulve Test.) 166:23-167:15.] Because CCH
22 did not want to do a transaction with Basin in its own name, Ward created VL
23 Capital, LLC ("VL Capital"). [Ex. 15 (Tekulve Test.) 167:16-167:25] Tekulve
24 understood that Ward was creating VL Capital solely for the transaction with CCH.
25 [Ex. 15 (Tekulve Test.) 168:1-168:3.] Tekulve was Ward's sole contact at Basin;
26 Ward spoke with Tekulve regularly on the telephone from June 2007 through
27 January 2008. [Ex. 49 (Ward Test.) 34:14-35:18.]

28 118. VL Capital was registered in Delaware as an LLC on June 29, 2007,

1 one day before the end of Basin's Q2 2007 on June 30, 2007, and Ward was its
2 Managing Member, and sole member. [Ex. 3 (Tekulve Answer) ¶ 57 (Tekulve
3 admits VL Capital was registered in Delaware on June 29, 2007.) VL Capital was
4 created to purchase units from Basin. [Ex. 15 (Tekulve Test.) 168:1-168:3; Ex. 49
5 (Ward Test.) 34:5-34:7.] It had no other business. Accordingly, it was a "special
6 purpose entity" ("SPE"). [See Ex. 51 (Depo. Ex. 108 (Agreements and Commitment
7 Letter ("VL Letter") between Basin and VL Capital) at 00002226 (VL Letter)
8 defining the buyer as VL Capital, LLC, "a "Special Purpose bankruptcy remote
9 entity."] Tekulve received the invoices from Ward relating to formation of VL
10 Capital and drafting of documents relating to the agreements between Basin and VL
11 Capital and VL Capital and CCH; Basin agreed to pay and paid these fees. [Ex. 50
12 (Test. Ex. 129); Ex. 15 (Tekulve Test.) 239:1-240:16.]

13 119. Tekulve knew that VL Capital was a newly formed entity with no assets,
14 and hence no financial statements. [Ex. 6 (Tekulve Depo.) 140:12-140:21.] Tekulve
15 also knew that absent Basin wanting to sell certain of its systems, VL Capital would
16 not have been created. [Ex. 6 (Tekulve Depo.) 141:13-141:25 & 141:4.]

17 120. Jensen participated with Tekulve in internal Basin discussions about
18 engaging in transactions with VL Capital. [See Ex. 1 (Complaint) ¶ 58; Ex. 2
19 (Jensen Answer) ¶ 58 (Jensen admits he "may have been present" at internal Basin
20 discussions regarding VL Capital); Ex. 3 (Tekulve Answer) ¶ 58 (Tekulve admits
21 that he participated in internal Basin discussions "together with Mr. Jensen about
22 VL Capital"); Ex. 15 (Tekulve Test.) 185:16-185:18, 187:19-188:16.]

23 121. Just before the end of Basin's Q2 2007, Basin purportedly sold and
24 delivered ten operating treatment systems to VL Capital. [See Ex. 3 (Tekulve
25 Answer) ¶ 59.] Tekulve caused Basin to record \$3.8 million in revenue from the
26 sale of these systems, which revenue represented the majority of its quarterly
27 revenues. [See Ex. 3 (Tekulve Answer) ¶ 59.]

28 122. Jensen was aware that revenue was recognized in Q2 2007 from the

1 purported transaction with VL Capital. [Ex. 14 (Jensen Test.). 150:10-150:15.]

2 123. Recognition of the \$3.8 million in revenue was improper under GAAP
3 for four reasons:

4 (1) **Basin did not have a definitive agreement with VL Capital in Q2**
5 **2007.** Indeed, the purported arrangement between the parties changed several times.

6 (a) In a letter dated June 27, 2007, (the “VL Letter”), two days
7 before VL Capital was even legally formed, VL Capital purported to advise Tekulve
8 that it had approved the purchase of treatment systems from Basin, but that such
9 purchase was subject to: (1) the negotiation and preparation of documentation
10 acceptable to VL Capital and its counsel; (2) the nonoccurrence of any material
11 adverse changes with respect to the financial or business condition of Basin or the
12 parties to any water service agreement; and (3) the final acceptance of the financing
13 terms by VL Capital and its lender, CCH. [Ex. 51(Depo. Ex. 108) at 00002226.]

14 (b) The VL Letter further provided that the “closing” at
15 which VL Capital would deposit a \$500,000 down payment and deliver 72
16 monthly deferred notes of \$62,500 each to Basin, would take place “no later than
17 June 30, 2007.” [Ex. 51 at 00002227.] Tekulve signed this letter as
18 “Acknowledged and Agreed” on or about June 28, 2007. [Ex. 51 at 00002228; Ex.
19 15 (Tekulve Test.) 188:25-189:7.] As set forth below, Basin and VL did not in fact
20 sign agreements (the “VL Agreements”) until well after June 30, 2007, the latest
21 possible date for the “closing” and the last day of Basin’s second quarter, after \$3.8
22 million had been recognized in revenue. Nor was the required \$500,000 deposit by
23 VL Capital made on or before June 30, 2007, as required by the VL Letter.

24 (c) The VL Agreements were signed by Tekulve on behalf of
25 Basin on or about September 14, 2007, and October 19, 2007. These agreements were
26 the Security Agreement [Ex. 51 at 00002198-2211] and Agreement to Sell & Purchase
27 [Ex. 51 at 00002212-21], each “dated [on the first page] as of September 14, 2007 and
28 effective as of June 30, 2007”; the Escrow Agreement dated on the first page “as of

1 September 14 2007”[Ex 51 at 00002230-42]; and the First Amendment to Escrow
2 Agreement stating on the first page it was “made as of October 19, 2007.” [Ex. 51 at
3 00002222-25]. The terms of the VL Agreements ultimately signed in fact did differ
4 from the terms set forth in the VL Letter, as explained below.

5 (2) **Basin’s sale to VL Capital had no economic substance as,**
6 **under both the VL Letter and the subsequent VL Agreements, all signed by**
7 **Tekulve, Basin essentially paid VL Capital to purchase the systems.** Specifically:

8 (a) Under the June 27, 2007, VL Letter, VL Capital (which
9 had no assets) was to pay Basin the \$5 million purchase price for the ten systems
10 by making a \$500,000 cash down payment at the June 30, 2007, closing and 72
11 monthly “deferred note” payments of \$62,500 which would come due beginning
12 April 1, 2008. [Ex. 51 at 00002227] The source of the \$5,000,000, including the
13 \$500,000 down payment, was to be the ultimate purchaser of the equipment, CCH,
14 which on June 29, 2007, entered into a separate “Equipment Purchase Facility
15 Commitment” with VL Capital. [Ex. 52 (Depo. Ex. 112) (CCH Commitment
16 Letter).] The VL Letter provided that Basin assigned all of its rights to payments
17 from its customers to VL Capital at \$69,250 per month, which was not deferred,
18 for 80 months, resulting in Basin having paid \$500,000 in eight monthly payments
19 beginning in July 2007 prior to the monthly payments owed by VL Capital to
20 Basin commencing on April 1, 2008. Additionally, once VL Capital began making
21 the monthly payments of \$62,500 to Basin, Basin would nevertheless continue to
22 pay VL Capital “for varying amounts, initially at \$69,250 per month,” which
23 would result in a \$6,750 monthly deficit to Basin [see Ex. 51 at 00002227];

24 (b) Under the Agreement to Sell and Purchase, “made as of
25 the 14th of September, 2007 and effective as of June 30, 2007,” VL Capital was to
26 pay Basin \$56,250 per month (rather than \$62,500) for 72 months beginning April
27 1, 2008 [Ex. 51 at 00002214 ¶ 5.c.], and, pursuant to the First Amendment to
28 Escrow Agreement, “made as of October 19, 2007,” [Ex. 51 at 00002222] no later

1 than “the Closing Date (as defined in the Purchase Agreement),” which new
2 closing date, September 7, 2007 [Ex. 51 at 00002214 ¶ 5], had already passed,
3 Basin itself was to round-trip its cash by depositing \$189,000 into an escrow
4 account as part of the \$500,000 down payment [Ex. 51 at 00002222 ¶ (3)(a)],
5 which VL Capital was purporting to pay to Basin [Ex. 51 at 00002214 ¶ 5]. The
6 escrow deposits of \$189,000 and \$311,000 were made on October 19, 2007 by
7 Basin and VL Capital respectively. [See Ex. 49 (Ward Test.) 92:10-94:2; Ex. 53
8 (Test. Ex. 239) at 00003310.]

9 (3) **The Agreement to Sell and Purchase made “as of”**
10 **September 14, 2007, contained an added contingency for payment of the**
11 **\$500,000 down payment to become due from VL Capital.**

12 (a) Specifically, Basin had to obtain within 90 days from the
13 new September 7, 2007, date of closing, written consent to the sale of the systems
14 from each of the ten customers who had leased them. [Ex. 51 at 00002213-14 ¶¶
15 4.b. & 5]. The First Amendment to the Escrow Agreement made “as of October
16 19, 2007” similarly included a provision that, for each Basin client from whom
17 such a consent had been obtained, the escrow agent “shall disburse to an account
18 designated in writing by” Basin from the purchase down payment an amount equal
19 to \$50,000, and that the standby fees of those entities that would be paid to Basin
20 would be disbursed by the escrow agent to VL Capital. [Ex. 51 at 00002222-23 ¶¶
21 (3)(a), (d) & (e); Ex. 49 (Ward Test.) 97:22-98:16.]

22 (b) Tekulve understood that without the consents by Basin’s
23 municipal clients, Basin would not collect the income of \$500,000. [Ex. 15
24 (Tekulve Test.) 198:1-198:12; Ex. 49 (Ward Test.) 98:9-98:16.] Basin in fact
25 never satisfied this contingency, as Tekulve, who was responsible for obtaining the
26 consents, only obtained four of them. [Ex. 49 (Ward Test.) 105:17-106:2; Ex. 15
27 (Tekulve Test.) 200:16-201:8 & 202:11-203:24 (four or five of municipalities
28 signed off while Tekulve was employed at Basin, as of early October 2008)]. ;

1 (4) **Collectability was not reasonably assured.** VL Capital was a
2 newly formed SPE with no operations, and absent each of Basin's customers
3 making payments that Basin had assigned to VL Capital, VL Capital would have
4 been unable in turn to make payments to Basin.

5 124. Because of these facts, revenue recognition did not comply with
6 GAAP, including SAB 104 and ARB 43, which require that collectability be
7 reasonably assured. Additionally, because Basin retained a majority of the risk
8 from the transaction, VL Capital's financial statements should have been
9 consolidated with Basin's financial statements under GAAP, specifically Financial
10 Accounting Standards Board Interpretation No. 46 (revised December 2003)
11 ("FIN46R"). [See Boudreau Declaration ¶ 19 & Ex. 4 (FIN46R) at 57, ¶ 5, 60, ¶¶
12 12-15, 79, ¶ D.19.] Ultimately, Basin did determine that such consolidation should
13 occur, and restated its 2007 financial statements to do so, reversing the revenue
14 recognized on this and other SPE transactions. [See Ex. 12 (Depo. Ex. 845
15 (Restatement)) at 01648603, Item 1.]

16 125. Tekulve understood that Basin, rather than CCH, was "obviously"
17 financing the majority of the transaction, including because "a half million dollars in
18 cash [] was put into the transaction" by Basin. [Ex. 15 (Tekulve Test.) 196:18-196:23.]

19 126. Even though Basin was in fact financing the transaction with VL
20 Capital, VL Capital entered into a purported agreement with CCH dated June 29,
21 2007, which described the "transaction structure" as: "[Basin] will sell the
22 equipment used to perform the WSA [water services] agreements to VL C[apital]
23 and VLC will purchase said equipment utilizing funding from CCH." [See Ex. 3
24 (Tekulve Answer) ¶ 61.] Tekulve saw or was otherwise aware of this letter. [Ex.
25 15 (Tekulve Test.) 193:19-194-11; Ex. 52 (CCH Letter) at 00002280.] Like the
26 original VL Letter, the CCH letter stated that "The initial closing shall take place no
27 later than June 30th 2007," the final day of Basin's second quarter. [Ex. 52 (CCH
28 Letter) at 00002280.] This letter was materially misleading, including to Basin's

1 auditors, as the \$500,000 deposit payable to Basin was not made by the end of
2 Basin's second quarter on June 30, 2007, and as Basin, not CCH, was, as Tekulve
3 admits, "obviously" financing the majority of the transaction.

4 **b) The Defendants Made False Representations To**
5 **Basin's Auditor About The VL Transaction**

6 127. On or about August 8, 2007, pursuant to a request by Basin's auditor,
7 Hansen prepared a memorandum, or "white paper," which, after being reviewed
8 and approved by Tekulve, was provided to Basin's auditors and discussed with
9 Basin's Audit Committee on or about August 9, 2007. [See Ex. 3 (Tekulve
10 Answer) ¶ 62; Ex. 6 (Tekulve Depo.) 144:21-144:25; Ex. 55 (Depo. Ex. 210 (white
11 paper).] The "white paper" purported to justify recognition of revenue based on
12 the June 27, 2007, VL Letter signed by Tekulve on June 28. [Ex. 55 at 1-2.]

13 128. The memorandum was materially misleading in part because it failed
14 to disclose that VL Capital was an SPE with no operations which Basin caused to
15 be created for the sole purpose of creating purported revenues. The memorandum
16 was also materially misleading because it failed to explain the timing of the
17 respective payments by Basin and VL Capital to each other, which resulted in
18 Basin effectively financing the transaction. Specifically, the memorandum does
19 not explain that Basin would be making payments commencing immediately, in
20 July 2007, which payments totaled the \$500,000 down payment payable by VL
21 Capital to Basin on April 1, 2008. Additionally, the memorandum misleadingly
22 states that "collectability is reasonably assured" because VL Capital had "already
23 placed \$500,000 in escrow" "as of" June 30, 2007. [See Ex. 3 (Tekulve Answer) ¶
24 62.] In fact, no monies had yet been deposited into escrow. Indeed, as set forth
25 above, no monies were deposited until October 19, 2007, almost four months after
26 Basin's second quarter ended, and two months after the white paper was submitted
27 to the auditors. As explained above, when monies were subsequently deposited on
28 October 19, 2007, pursuant to the VL Agreements rather than the VL Letter,

1 \$189,000 of the funds were deposited by Basin itself, rather than VL Capital.

2 129. On August 13, 2007, Tekulve signed a management representation
3 letter to SingerLewak, Basin's auditors. [Ex. 6 (Tekulve Depo.) 156:16-156:22;
4 Ex. 56 (Depo. Ex. 641 (letter)) at 4.] Hansen also signed the letter. [Ex. 56 at 5.]
5 In the letter, Tekulve confirmed "that we are responsible for the fair presentation of
6 the interim financial information in conformity with accounting principles
7 generally accepted in the United States of America and Rule 10-01(a)-(c) of
8 Regulation S-X." [Ex. 56 at 1.] He further represented in this management
9 representation letter, among other things, that:

- 10 a. The interim financial information was presented in accordance
11 with GAAP applicable to interim financial information applied
12 on a basis substantially consistent with the same period in the
13 prior year, the immediately preceding quarter and the prior
14 fiscal year [Ex. 56 at 1 ¶ 1];
- 15 b. He had made available to SingerLewak all financial records and
16 related data [Ex. 56 at 1 ¶ 2.a.];
- 17 c. He had no knowledge of any fraud or suspected fraud affecting
18 the Company involving management [Ex. 56 at 1 ¶ 6.a.];
- 19 d. There were no material transactions that have not been properly
20 recorded in the accounting records underlying the interim
21 financial information [Ex. 56 at 2 ¶ 12];
- 22 e. He had responded fully to all inquiries made by the auditors
23 [Ex. 56 at 2 ¶ 15];
- 24 f. "[T]he transaction with VL Capital on June 28, 2007 for the
25 sale of 10 water treatment units is recorded in the proper period
26 and the valuation of the transaction is proper in accordance with
27 [GAAP]" [Ex. 56 at 3 ¶ 18]; and
- 28 g. No events or transactions other than those disclosed in the

interim financial information had occurred subsequent to June 30, 2007, that would require adjustment to, or disclosure in, the interim financial information [Ex. 56 at 3].

Each of these representations was false because recognition of revenue from the VL Capital transaction did not comply with GAAP, and these \$3.8 million in revenues constituted over half of Basin's second quarter revenues and were material to Basin's financial statements.

c) **Jensen And Tekulve Caused Basin's Materially False Financial Results To Be Disseminated To The Investing Public**

(1) **Tekulve Issued A False Earnings Release**

130. On August 13, 2007, Tekulve caused Basin to issue its Q2 2007 earnings release for release the next day. [Ex. 1 (Complaint) ¶ 64; Ex. 2 (Jensen Answer) ¶ 64; Ex. 3 (Tekulve Answer) ¶ 64.] Tekulve caused it to be filed August 14, 2007, with the Commission on Form 8-K and signed the filing. [Ex. 3 (Tekulve Answer) ¶ 64; Ex. 6 (Tekulve Depo.) 159:19-159:95; Ex. 57 (Depo. Ex. 985 (8-K).]

131. The headline on the earnings press release stated in part: "**Quarterly Revenues at \$6.4 Million**" [Ex. 3 (Tekulve Answer) ¶ 64.] In the press release, it is represented that:

For the second quarter of 2007, revenues of \$6.4 million increased \$1.4 million when compared to revenues of \$5.0 million in the second quarter of 2006, a 28% increase. System sales revenues were \$5.2 million for the second quarter of 2007, compared to \$4.2 million in the same period in 2006. As anticipated, the increase in system sales revenue this quarter was due primarily to a third party financing arrangement whereby Basin Water sold 10 water treatment systems of various capacities which had previously been placed with customers. [Ex. 3 (Tekulve Answer) ¶ 64; Ex. 57 at 01646188.] The release also reported that six

1 month results included revenues of \$8 million. [Ex. 3 (Tekulve Answer) ¶ 64; Ex. 57
2 at 01646188.] All of these representations were materially false and misleading as the
3 \$3.8 million in revenue recognized from the VL Capital transaction was not, in fact,
4 the result of a “third party financing arrangement,” had no economic substance, and
5 was material to both the quarterly and year to date revenues.

6 (2) **The Defendants Caused The Filing Of A False**
7 **Second Quarter 2007 10-Q, And Falsely**
8 **Certified Its Accuracy**

9 132. On or about August 14, 2007, Tekulve also caused Basin to file with
10 the Commission its quarterly report on Form 10-Q, for its second quarter 2007
11 (“Q2 2007”) ended June 30, 2007. [Ex. 1 (Complaint) ¶ 65; Ex. 2 (Jensen Answer)
12 ¶ 65; Ex. 3 (Tekulve Answer) ¶ 65; Ex. 58 (Depo. Ex. 211(10-Q)).] Jensen read
13 the Form 10-Q before it was filed, and Tekulve signed the Form 10-Q as Basin’s
14 CFO. [Ex. 1 (Complaint) ¶ 65; Ex. 2 (Jensen Answer) ¶ 65; Ex. 3 (Tekulve
15 Answer) ¶ 65.] Among other results, Basin’s Form 10-Q reported second quarter
16 system sales of \$5,199,000 and total revenues of \$6,414,000, and year to date
17 system sales of \$6,128,000 and total revenues of \$8,666,000. [Ex. 1 (Complaint) ¶
18 65; Ex. 3 (Tekulve Answer) ¶ 65; Ex. 58 at 00002948.] These system sales and
19 revenues included the \$3.8 million in revenue purportedly earned from the sale of
20 systems to VL Capital. [Ex. 3 (Tekulve Answer) ¶ 65.]

21 133. In describing Basin’s revenues, the Form 10-Q states that:
22 Revenues from system sales increased \$1.0 million, or 24%, in the
23 second quarter of 2007 when compared to the same period in 2006.
24 This was due to the previously announced third party financing
25 arrangement whereby we sold 10 water treatment systems of various
26 capacities for \$3.8 million which had previously been placed with
27 customers to a third party affiliate of a bank.
28 [Ex. 3 (Tekulve Answer) ¶ 65; Ex. 58 at 00002963.] This statement is false and

misleading as the “third party” to which Basin claims to have sold the systems was in fact an SPE created solely for making the purchase of these systems and substantially increasing Basin’s quarterly revenues, and the “financing” was, in fact, substantially provided by Basin. As a result of the improper recording of the \$3.8 million in revenue, Basin’s Q2 and year-to-date revenues were overstated by 162% and 98%, respectively; its Q2 and year-to-date system sales were overstated by 321% and 183%, respectively; and its Q2 and year-to-date gross profits were overstated by 105% and 67%, respectively.

134. On or about August 14, 2007, Jensen and Tekulve each certified, among other things, with regard to the Form 10-Q, that:

- a. He had reviewed the Form 10-Q;
- b. Based on his knowledge, the Form 10-Q did not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading with respect to the period covered by the report;
- c. Based on his knowledge, the financial statements, and other financial information included in the report fairly presented in all material respects the financial condition, results of operations and cash flows of Basin as of and for the periods presented in the report; and
- d. He had disclosed to Basin’s auditors and the audit committee of Basin’s Board of Directors any fraud that involved company management.

[Ex. 1 (Complaint) ¶ 66; Ex. 2 (Jensen Answer) ¶ 66; Ex. 3 (Tekulve Answer) ¶ 66; Ex. 58 at 00002977-80.]

135. Jensen was, at a minimum, reckless in certifying the Form 10-Q, as he claims he asked no questions about note 6 to the financial statements, regarding the

1 VL Capital transaction [Ex. 58 at 00002958]; nor did he ask any questions about the
2 transaction in light of its size to Tekulve, Stark, the auditors or Basin's counsel. [See
3 Ex. 5 (Jensen Depo.) 145:3-148:7, 148:9-15; Ex. 6 (Tekulve Depo.) 158:25-159:18.]
4 The certifications by both Jensen and Tekulve were false in that the Form 10-Q
5 contained material misrepresentations and omissions of material fact regarding
6 Basin's quarterly and year to date revenues, and did not fairly represent Basin's
7 financial condition, and Jensen and Tekulve had not disclosed to either Basin's
8 auditors or its audit committee the fraud in causing the improper revenue recognition.

9 (3) **Tekulve Made False And Misleading**
10 **Statements In The Q2 2007 Analyst Conference**
11 **Call Which Neither He Nor Jensen Corrected**

12 136. At about 1:30 p.m. Pacific Time on August 14, 2007, Jensen and
13 Tekulve participated on behalf of Basin in an analyst conference call, together with
14 Stark, for which call Tekulve had drafted the script the previous day. [Ex. 1
15 (Complaint) ¶ 67; Ex. 2 (Jensen Answer) ¶ 67; Ex. 3 (Tekulve Answer) ¶ 67
16 (admitting he drafted "some of" the script; Ex. 5 (Jensen Depo.) 150:5-151:10; Ex.
17 6 (Tekulve Depo.) at 160:12-160:17; Ex. 59 (Depo. Ex. 832 (call Tr.)).]

18 137. Among other representations, in response to a specific question by an
19 analyst asking "[H]ow many [systems] have been third-party financed?" Tekulve
20 represented that Basin had "third party financed" thirteen systems, including "today's
21 10," and that "there is a total of 10 systems that were sold." [Ex. 3 (Tekulve Answer)
22 ¶ 67; Ex. 59 at 6.] This representation, which was misleading because the "third
23 party financing" was in fact substantially provided by Basin itself, was not corrected
24 by either Jensen or Tekulve to disclose the material facts surrounding the purported
25 sales to VL Capital, or that the revenue from these purported sales was, in fact,
26 improperly recognized. [See Ex. 3 (Tekulve Answer) ¶ 67; Ex. 59.]

27 ///

28 ///

1 **7. The Defendants Materially Overstated Basin’s Q3 2007 And**
2 **Year-To-Date Revenues By Engaging In A Sham \$2.1**
3 **Million Sale To Another Special Purpose Entity Tekulve**
4 **Caused To Be Created**
5 **a) Tekulve Caused Basin To Recognize Revenue On A**
6 **Second Sham Transaction**

7 138. Water Services Solutions, LLC (“WSS”) was registered as an LLC on
8 September 27, 2007, three days before the end of Basin’s Q3 2007 on September
9 30, 2007. [Ex. 3 (Tekulve Answer) ¶ 68.] Ward was its Managing Member, and
10 sole member. Like VL Capital, WSS was created solely to purchase units from
11 Basin. It had no other business. Accordingly, like VL Capital, it was an SPE.

12 139. Seventeen days before it was legally formed, on September 10, 2007,
13 WSS purportedly transmitted a letter to Tekulve signed by Ward, which proposed
14 that WSS purchase systems then being manufactured by Basin for lease to the City
15 of Cottonwood for \$4.4 million less the present value of expected costs of
16 insurance and property taxes related to the purchase (the “WSS Letter”). [See Ex.
17 1 (Complaint) ¶ 69; Ex. 3 (Tekulve Answer) ¶ 69 (admitting receiving the letter);
18 Ex. 15 (Tekulve Test.) 257:12-258:4; Ex. 61 (Depo. Ex. 731 (WSS Letter)); Ex. 67
19 (Ward Depo.) at 211:18-212:8.] Tekulve signed the WSS Letter as “acceptable
20 and agreed to” on or about September 24, 2007. [Ex. 61 at 01425650.]

21 140. Tekulve caused Basin to recognize \$2.1 million in revenue in Q3 2007
22 relating to the purported sale of the units to WSS based on the “percentage of
23 completion method” for recognizing revenue. [See Ex. 3 (Tekulve Answer) ¶ 70
24 (admitting Basin recognized \$2.1 million in revenue in Q3 2007 for the WSS
25 transaction).] Recognition of this revenue was improper, however, because:

26 **a. Basin did not have a definitive agreement with WSS, as**
27 **required by the WSS letter.** Such agreement (the WSS Agreement”) was not
28 prepared and signed by Tekulve until the end of the next quarter, December 2007,

1 and was made “as of December 27, 2007 and effective as of September 24, 2007” [
2 Ex. 15 (Tekulve Test.) 272:7-272:19; Ex. 62 (Test. Ex. 214 (WSS Agreement)) at
3 00002997]; additionally, the WSS Agreement contained materially different terms,
4 such as a lower purchase price of \$3,845,073, and payment of the \$25,000 down
5 payment at the December 27, 2007, closing date [Ex. 62 at 00002997 ¶ 2 &
6 00002999 ¶ 5 & 5.b.];

7 **b. WSS had not made the initial down payment of \$25,000**
8 **required by the WSS Letter “to be held in escrow pending execution of**
9 **definitive documentation” and in fact, never paid it.** [Ex. 15 (Tekulve Test.)
10 261:1-261:9; Ward Depo. (Ex 67) at 211:20-211:24 & 214:2-214:6];

11 **c. Collectability was not probable.** WSS had no assets and was
12 dependent on a \$2.1 million loan from a third party, National City Energy Capital,
13 LLC based in Cincinnati, Ohio. The initial closing date of the loan was December
14 31, 2007, as set forth in the September 28, 2007, correspondence from National City
15 to WSS which Tekulve received that same day; however, that loan was never
16 finalized or funded. [Ward Depo. (Ex 67) at 211:20-211:24 & 214:2-214:6, 214:18-
17 215:1; *see also* Ex. 15 (Tekulve Test.) 265:8-265:10, 266:10-266:22, 277:13-277:20
18 (National City “walked away” from the transaction in the summer of 2008)]; and

19 **d. Delivery by Basin of the systems, which were being**
20 **manufactured, had not occurred.** [Ex. 15 (Tekulve Test.) 265:11-266:9].

21 **b) Tekulve Made False Representations To Basin’s**
22 **Auditor About The WSS Transaction**

23 141. On or about October 31, 2007, pursuant to a request by Basin’s auditor,
24 Hansen, prepared a second memorandum, or “white paper,” regarding the WSS
25 transaction, which, after being reviewed and approved by Tekulve on or about
26 November 1, was provided to Basin’s auditors. [See Ex. 3 (Tekulve Answer) ¶ 71;
27 Ex. 15 (Tekulve Test.) 283:8-284:1; Ex. 63 (Depo. Ex. 215 (white paper)).] The
28 memorandum purported to justify recognition of revenue based on the September

1 10, 2007, WSS Letter signed by Tekulve on September 24. The memorandum was
2 materially misleading in part because it failed to disclose that WSS was an SPE with
3 no operations which Basin caused to be created for the sole purpose of creating
4 purported revenues. Additionally, the memorandum misleadingly states that
5 “collectability is reasonably assured” because WSS “is backed by National City, a
6 large Chicago bank.” [See Ex. 3 (Tekulve Answer) ¶ 71 (admitting the
7 memorandum makes these statements); Ex. 63 at 4.] In fact, “National City” was
8 National City Energy Capital LLC, based in Cincinnati, Ohio. Additionally, the
9 memorandum falsely states the \$25,000 deposit had been made into an escrow
10 account when in fact no such deposit had been made. [Ex. 63 at 4.] Tekulve made
11 this representation to the auditors without, in fact, knowing if the deposit had been
12 made. [Ex. 6 (Tekulve Depo.) at 166:17-166:24.] In fact, as stated above, the
13 National City financing and \$25,000 escrow deposit never occurred.

14 142. On November 13, 2007, Tekulve signed a management representation
15 letter to SingerLewak, Basin’s auditors. [Ex. 1 (Complaint) ¶ 72; Ex. 3 (Tekulve
16 Answer) ¶ 72; Ex. 6 (Tekulve Depo.) 170:3-170:7; Ex. 64 (Depo. Ex. 642 (letter).]
17 Hansen also signed the letter.

18 143. Tekulve confirmed “that we are responsible for the fair presentation of
19 the interim financial information in conformity with accounting principles generally
20 accepted in the United States of America and Rule 10-01(a)-(c) of Regulation S-X.”
21 [Ex. 1 (Complaint) ¶ 72; Ex. 3 (Tekulve Answer) ¶ 72; Ex. 64 at 1.] He further
22 represented in this management representation letter, among other things, that:

- 23 a. The interim financial information was presented in accordance
24 with GAAP applicable to interim financial information applied
25 on an basis substantially consistent with the same period in the
26 prior year, the immediately preceding quarter and the prior
27 fiscal year [Ex. 64 at 1 ¶ 1];
- 28 b. He had made available to SingerLewak all financial records and

related data [Ex. 64 at 1 ¶ 2.a.];

c. He had no knowledge of any fraud or suspected fraud affecting the Company involving management [Ex. 64 at 2 ¶ 6.a.];

d. There are no material transactions that have not been properly recorded in the accounting records underlying the interim financial information [Ex. 64 at 2 ¶ 12];

e. He had responded fully to all inquiries made by the auditors [Ex. 64 at 2 ¶ 15];

f. “[T]he transaction with Water Services Solutions, LLC (WSS) on September 24, 2007 of [sic] water treatment units is recorded in the proper period and the valuation of the transaction is proper in accordance with [GAAP]” [Ex. 64 at 3 ¶ 18]; and

g. No events or transactions other than those disclosed in the interim financial information have occurred subsequent to September 30, 2007, that would require adjustment to, or disclosure in, the interim financial information [Ex. 64 at 3].

[See also Ex. 1 (Complaint) ¶ 72; Ex. 3 (Tekulve Answer) ¶ 72.] Each of these representations was false because recognition of revenue from the WSS transaction did not comply with GAAP, and these revenues were material to both Basin’s third quarter 2007 and year-to-date financial statements.

c) **Jensen And Tekulve Caused Basin’s Materially False Financial Results To Be Disseminated To The Investing Public**

(1) **The Defendants Caused The Filing Of A False Third Quarter 2007 10-Q, And Falsely Certified Its Accuracy**

144. On or about November 13, 2007, Tekulve caused Basin to file with

1 the Commission its quarterly report on Form 10-Q, for its third quarter 2007 (“Q3
2 2007”) ended September 30, 2007. [Ex. 1 (Complaint) ¶ 73; Ex. 2 (Jensen
3 Answer) ¶ 73; Ex. 3 (Tekulve Answer) ¶ 73; Ex. 65 (Depo. Ex. 235 (10-Q)).]
4 Jensen read and signed the Form 10-Q before it was filed, and Tekulve signed the
5 Form 10-Q as Basin’s CFO. [Ex. 1 (Complaint) ¶ 73; Ex. 2 (Jensen Answer) ¶ 73;
6 Ex. 3 (Tekulve Answer) ¶ 73.]

7 145. Among other results, Basin’s Form 10-Q reported system sales of
8 \$3,773,000 and total revenues of \$5,346,000. [Ex. 3 (Tekulve Answer) ¶ 73; Ex.
9 65 at 00003133.] These system sales and revenues included the \$2.1 million in
10 revenue purportedly earned from the sale of systems to WSS. [Ex. 3 (Tekulve
11 Answer) ¶ 73.] This resulted in material overstatements of Basin’s quarterly
12 system sales and total revenues of 104%, and 56%, respectively. [Boudreau
13 Declaration ¶ 3 (chart).]

14 146. Additionally, the Form 10-Q reports for the nine months ended
15 September 30, 2007, \$9,901,000 in system sales and \$13,367,000 in total revenues
16 [Ex. 65 at 00003133.], which revenues include both the \$3.8 million in revenue
17 purportedly earned from the sale of systems to VL Capital, and the \$2.1 million in
18 revenue from the purported sales to WSS. This resulted in material overstatements of
19 Basin’s year-to-date system sales, total revenues and gross profits of 147%, 79% and
20 10%, respectively. [See Ex. 3 (Tekulve Answer) ¶ 73 (admitting the VL and WSS
21 revenues were 44% of year-to-date revenues); Boudreau Declaration ¶ 3 (chart).]

22 147. The Q3 Form 10-Q also included only the specific disclosure
23 regarding the revenues recognized from the transaction with VL Capital in the
24 second quarter, and no similar or other disclosure regarding the transaction that
25 quarter with WSS pursuant to which \$2.1 million in revenue was recognized. [See
26 Ex. 65 at 00003145 Note 7 & 00003155 (describing revenues for the nine month
27 period ended September 30, 2007).]

28 148. On or about November 13, 2007, Jensen and Tekulve each certified,

1 among other things, with regard to the Form 10-Q, that:

- 2 a. He had reviewed the Form 10-Q;
- 3 b. Based on his knowledge, the Form 10-Q did not contain any
4 untrue statement of material fact or omit to state a material fact
5 necessary to make the statements made, in light of the
6 circumstances under which they were made, not misleading
7 with respect to the period covered by the report;
- 8 c. Based on his knowledge, the financial statements, and other
9 financial information included in the report fairly presented in
10 all material respects the financial condition, results of
11 operations and cash flows of Basin as of and for the periods
12 presented in the report; and
- 13 d. He had disclosed to Basin's auditors and the audit committee of
14 Basin's Board of Directors any fraud that involved company
15 management.

16 [Ex. 1 (Complaint) ¶ 74; Ex. 2 (Jensen Answer) ¶ 74; Ex. 3 (Tekulve Answer) ¶
17 74.] These certifications were false in that the Form 10-Q contained material
18 misrepresentations and omissions of material fact regarding Basin's quarterly
19 revenues, and did not fairly represent Basin's financial condition, and Jensen and
20 Tekulve had not disclosed to either Basin's auditors or its audit committee their
21 fraud in causing the improper revenue recognition.

22 149. Jensen certified the Form 10-Q knowing that WSS "was one of these
23 financing deals," not knowing whether the disclosures regarding the \$3.8 million in
24 revenue recognized for a "third party financing arrangement" related to the VL
25 Capital transaction for the prior quarter, and not having had any discussions with
26 anyone about whether or not specific disclosure should be made of the WSS
27 transaction. [Ex. 5 (Jensen Depo.) 151:11-152:20 & 152:24-153:9.]

28 ///

(2) **Tekulve Caused Basin To Issue A False
Earnings Release**

150. On the morning of November 14, 2007, Tekulve caused Basin to issue its Q3 2007 earnings release. [Ex. 1 (Complaint) ¶ 75; Ex. 2 (Jensen Answer) ¶ 75; Ex. 3 (Tekulve Answer) ¶ 75.] Tekulve caused it to be filed with the Commission that day on Form 8-K and signed the filing. [Ex. 3 (Tekulve Answer) ¶ 75 (admits he signed the filing), Ex. 65 (Depo. Ex. 986 (8-K)).]

151. The headline on the earnings press release stated in part: “**Quarterly Revenues Increase 10% to \$5.3 Million Over Prior Quarter**” [Ex. 1 (Complaint) ¶ 75; Ex. 3 (Tekulve Answer) ¶ 75.] In the earnings press release, it is represented that:

For the third quarter of 2007, revenues of \$5.3 million increased \$0.5 million when compared to revenues of \$4.8 million in the third quarter of 2006, a 10% increase. System sales revenues were \$3.8 million. . .

[Ex. 1 (Complaint) ¶ 75; Ex. 3 (Tekulve Answer) ¶ 75.] The release also reported that nine month results included revenues of \$13.4 million. [Ex. 1 (Complaint) ¶ 75; Ex. 3 (Tekulve Answer) ¶ 75.] All of these representations were materially false and misleading as the \$5.3 million in quarterly revenue included \$2.1 million recognized from the WSS transaction, and the \$13.4 million year-to-date revenue included both the \$2.1 million in revenue from the WSS transaction and the \$3.8 million from the VL Capital transaction, none of which was properly recognized.

(3) **Tekulve Made False And Misleading
Statements In The Q3 2007 Analyst Conference
Call Which Neither He Nor Jensen Corrected**

152. At about 1:30 p.m. Pacific Time on November 14, 2007, Jensen and Tekulve participated on behalf of Basin in an analyst conference call, together with Stark, for which call Tekulve had drafted the script earlier that day, making changes together with Jensen and Stark. [Ex. 1 (Complaint) ¶ 76; Ex. 3 (Tekulve Answer ¶ 76 (admitting he “helped draft some of the script”; Ex. 2 (Jensen Answer) ¶ 76 (Jensen

1 admits participating in the conference call); Ex. 66 (Depo. Ex. 987 (call Tr.).]

2 153. During this call, in response to an analyst's question as to whether all
3 of Basin's \$3.8 million in systems sales were all "new" revenues or "do we have
4 any of those third party financings we had in the last quarter?", Tekulve
5 represented that "They're all new sales. There's a piece coming in from the prior
6 quarter that's just part of your normal percent completion. And there is a single
7 third party financing but that's on a new sale. It simply was a lease arrangement
8 that we third party financed." [Ex. 66 (call Tr.) at 01642844.] These
9 representations were materially false and misleading because Tekulve and Jensen
10 did not disclose that over half of the systems revenue, \$2.1 million, constituted that
11 "single third party financing"; that the financing had not in fact yet occurred; that
12 the transaction had not been finalized; and that revenue should not in fact have
13 been recognized on it. Nor did Tekulve disclose that the transaction was with a
14 "third party," WSS, which was in fact an SPE with no assets, created by Basin for
15 no other purpose than to purchase the Cottonwood systems to boost Basin's
16 revenue. [See Ex. 3 (Tekulve Answer) ¶ 76; Ex. 66 (Tr.).]

17 **8. Tekulve Materially Overstated Basin's FY 2007 Revenues**

18 **a) Tekulve Caused Basin To Recognize Revenues On**
19 **Two Additional Sham SPE Transactions**

20 154. On or about December 26, 2007, five days before the end of Basin's
21 fiscal year, Tekulve initiated documentation of two additional purported sales to
22 SPEs, one with VL Capital and one with WSS. [See Ex. 3 (Tekulve Answer) ¶ 77
23 (admitting existence of a document dated December 26, 2007, that includes terms
24 of a sale between Basin and WSS).] Although, as he noted in his calendar on
25 December 28, 2007, Tekulve found it to be "a pain" to prepare the documentation,
26 he further noted "but we need the revenues." [See Ex. 3 (Tekulve Answer) ¶ 77
27 (admitting language of calendar entry).]

28 155. Tekulve caused Basin to enter into an agreement with WSS "as of the

26th day of December 2007 and effective as of the same date” which purported to sell an existing system in the East Valley Water District to WSS for \$1,353,079. [Ex. 3 (Tekulve Answer) ¶ 78; *see also* Ex. 68 (Depo. Ex. 121 (Agreement to Sell and Purchase EVWD)).] Tekulve signed this agreement on behalf of Basin. [Ex. 3 (Tekulve Answer) ¶ 78.]

156. Tekulve also caused Basin to enter into an agreement with VL Capital “as of the 31st day of December 2007 and on [sic] that same date” which purported to sell an existing system to VL Capital for \$763,330. [*See* Ex. 3 (Tekulve Answer) ¶ 79; *see also* Ex. 69 (Depo. Ex. 145(Agreement to Purchase and Sell CW 65)).] Tekulve signed this agreement on behalf of Basin. [Ex. 3 (Tekulve Answer) ¶ 79.]

157. Tekulve caused Basin to recognize the full amount of revenue of \$1,353,079 on the second WSS agreement and \$489,000 on the second VL Capital agreement, purporting to use the “percentage of completion” method for recognizing revenue, recognizing a total of \$1,842,079 in revenue. [Ex. 1 (Complaint) ¶ 80; Ex. 3 (Tekulve Answer) ¶ 80.]

158. Recognition of revenue on these purported sales was improper for several reasons, including that collectability was not reasonably assured. In particular:

a. **The payment terms only required small down payments of \$5,000 by WSS and \$10,000 by VL Capital.** [Ex. 68 (WSS) at 00002330 ¶ 5.(d) (deposit into escrow accounts); Ex. 69 (VL Capital) at 00002529 ¶ 5.(b) (deposit into trust account).]

b. **These payments were conditioned on customer notification and/or acceptance of the assignment to the purchaser (WSS or VL Capital), which never occurred.** [Ex. 68 at 00002329 ¶ 4.(b) (requiring Basin to promptly send to the client (EVWD) “a written letter to acknowledge the assignment” of certain rights to WSS); Ex. 69 at 00002528-29 ¶ 4.(b)(i) & 5.(c) (requiring Basin to send a written notification to the client (Cal Water) of the assignment of the standby fees and ownership, and execution by the client of the Notice of Assignment)].

1 (i) This condition was never met with regard to the WSS
2 transaction because the EVWD was never notified of the assignment, and Robert
3 Martin, the EVWD general manager who dealt with Basin, would have been
4 concerned if the units were sold to a third party because the units could, among
5 other things, potentially be repossessed by that third party. [Ex. 70 (Martin Depo.)
6 at 10:21-10:24, 97:14-98:13, 98:20-99:4, 99:7-99:8, 99:11-99:18, 99:20-100:4.]

7 (ii) Similarly, the condition was never met with regard to the
8 transaction with VL Capital involving Cal Water Well 65, because Tekulve had no
9 conversations with anyone at Cal Water to obtain consent to the transaction, and
10 did not speak to National City about it. [Ex. 6 (Tekulve Depo.) at 171:2-172:9].

11 **c. National City had not in fact financed the earlier Q3 2007**
12 **transaction with WSS.** There was accordingly no basis for believing it would
13 finance a second transaction with that same entity, or a transaction with VL
14 Capital, which was purportedly controlled by Ward, the same person who
15 controlled WSS.

16 **d. Basin was financing the transaction.** The contracts provided for
17 larger payments of \$561,606 by WSS and \$30,568 by VL Capital after customer
18 acceptance; and a long-term loan by Basin for the balance (ten year repayment by WSS
19 with no payment due for the first five years, and no payment due at all if the lessee
20 purchased the system within five years; and nine year repayment by VL Capital). [Ex.
21 68 (WSS) at 00002330 ¶ 5.(d); Ex. 69 (VL Capital) at 00002529 ¶ 5.(c) & (d)]

22 **b) Tekulve Made False Representations To Basin's**
23 **Auditor About The Second VL Capital And WSS**
24 **Transactions**

25 159. On March 17, 2008, Tekulve signed a letter to SingerLewak, Basin's
26 auditors. Hansen also signed this letter. Tekulve confirmed "that we [Basin
27 management] are responsible for the fair presentation of the interim financial
28 information in conformity with accounting principles generally accepted in the United

1 States of America.” [Ex. 1 (Complaint) ¶ 82; Ex. 3 (Tekulve Answer) ¶ 82; *see also*
2 Ex. 71 (Depo. Ex. 219 (letter) at 1.] He further represented in this Management
3 Representation Letter, among other things, that:

- 4 a. The financial statements were fairly presented in conformity
5 with GAAP [Ex. 71 at 1 ¶ 1];
- 6 b. He had made available to SingerLewak all financial records and
7 related data [Ex. 71 at 1 ¶ 2.a.];
- 8 c. He had no knowledge of any fraud or suspected fraud affecting
9 the Company involving senior management or management
10 [Ex. 71 at 1 ¶ 3.a.];
- 11 d. There were no material transactions that had not been properly
12 recorded in the accounting records underlying the financial
13 statements [Ex. 71 at 2 ¶ 15.a.]; and
- 14 e. The Company has properly recorded all revenue transactions in
15 accordance with revenue recognition policies, including under
16 the percentage-of-completion method [Ex. 71 at 4 ¶ 24].

17 [Ex. 1 (Complaint) ¶ 82; Ex. 3 (Tekulve Answer) ¶ 82.] Each of these
18 representations was false because recognition of revenue from the two WSS and
19 two VL Capital transactions did not comply with GAAP, and these revenues,
20 totaling \$7.7 million, or 41 % of Basin’s 2007 annual revenues, were material to
21 Basin’s financial statements. [See Ex. 3 (Tekulve Answer) ¶ 83 (admitting \$7.7
22 million constituted 41% of Basin’s revenue).]

23 c) **Jensen And Tekulve Caused Basin’s Materially False**
24 **Financial Results To Be Disseminated To The**
25 **Investing Public**
26 (1) **Tekulve Caused Issuance Of A False Earnings**
27 **Release**

28 160. At or about 1:01 p.m. on March 17, 2008, Tekulve caused Basin to

1 issue its FY 2007 earnings release. [Ex. 1 (Complaint) ¶ 83; Ex. 2 (Jensen
2 Answer) ¶ 83; Ex. 3 (Tekulve Answer) ¶ 83.] Tekulve caused it to be filed with
3 the Commission that day on Form 8-K and signed the filing. [Ex. 1 (Complaint) ¶
4 83; Ex. 2 (Jensen Answer) ¶ 83; Ex. 3 (Tekulve Answer) ¶ 83.] The headline on
5 the press release stated in part: **“Twelve Month Revenues Increase 10% to \$18.8**
6 **Million”** [Ex.1 (Complaint) ¶ 83; Ex. 3 (Tekulve Answer) ¶ 83.] In the press
7 release, it is represented that:

8 For the year ended 2007, revenues increased by 10% to \$18.8 million
9 compared to \$17.1 million for the year 2006. For the year, system
10 sales revenues were \$13.5 million. . . .

11 For the fourth quarter of 2007, revenues of \$5.4 million were
12 approximately 50% higher than our revenues for the fourth quarter of
13 2006. For the fourth quarter of 2007, system sales revenues were \$3.6
14 million. . . .

15 [Ex. 1 (Complaint) ¶ 83; Ex. 3 (Tekulve Answer) ¶ 83.]

16 161. All of these representations were materially false and misleading as
17 (1) the quarterly revenue included the \$1,353,079 in revenue recognized on the
18 second WSS agreement and the \$489,000 recognized on the second VL Capital
19 agreement, purporting to use the “percentage of completion” method for
20 recognizing revenue – a total of \$1,842,079 in revenue; and (2) the annual revenue
21 included both the improperly recognized \$1,842,079 in fourth quarter revenues, but
22 also \$2.1 million in revenue from the third quarter WSS transaction and the \$3.8
23 million from the second VL Capital transaction, none of which was properly
24 recognized. These \$7.7 million in revenues were material, constituting 42% of
25 Basin’s reported annual revenue. [See Ex. 3 (Tekulve Answer) ¶ 83 (admitting
26 \$7.7 million constituted 41% of Basin’s revenue).]

27 ///

28 ///

(2) **Tekulve Caused The Filing Of A False 2007
Form 10-K, And Falsely Certified Its Accuracy**

162. Also on March 17, 2008, Tekulve caused Basin to file with the Commission its annual report on Form 10-K, for its fiscal year 2007 (“FY 2007”) ended December 31, 2007. [Ex. 1 (Complaint) ¶ 84; Ex. 2 (Jensen Answer) ¶ 84; Ex. 3 (Tekulve Answer) ¶ 84; Ex. 72 (Depo. Ex. 236 (2007 10-K).] Tekulve signed the Form 10-K as Basin’s CFO. [Ex. 1 (Complaint) ¶ 84; Ex. 3 (Tekulve Answer) ¶ 84.] Basin’s FY 2007 Form 10-K reported total revenues of \$18,784,000, and system sales of \$13,477,000. [Ex. 3 (Tekulve Answer) ¶ 84.] As a result of the improper recording of revenue on the SPE transactions, Basin’s Q4 and annual revenues were overstated by 63% and 74%, respectively; its Q4 and annual system sales were overstated by 143% and 145%, respectively; and its gross profits were overstated by 387% and 19%, respectively. [Boudreau Declaration ¶ 3 (chart).]

163. Although the Form 10-K does disclose that VL Capital and WSS accounted for 26% and 14% of Basin’s annual revenues respectively, it does not disclose that VL Capital and WSS were SPEs created by Basin for the sole purpose of Basin “selling” them systems on which Basin would then recognize revenue, and that Basin itself would be “lending” its own monies to these entities in order to purchase that revenue. [See Ex. 3 (Tekulve Answer) ¶ 84.] The Form 10-K further failed to disclose that none of the revenues purportedly received from transactions with VL Capital and WSS were properly recognized. [Ex. 3 (Tekulve Answer) ¶ 84.]

164. On or about March 17, 2008, Tekulve certified, among other things, with regard to the Form 10-K, that:

- a. He had reviewed the Form 10-K;
- b. Based on his knowledge, the Form 10-K did not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading

1 with respect to the period covered by the report;

2 c. Based on his knowledge, the financial statements, and other
3 financial information included in the report fairly presented in
4 all material respects the financial condition, results of
5 operations and cash flows of Basin as of and for the periods
6 presented in the report; and

7 d. He had disclosed to Basin's auditors and the audit committee of
8 Basin's Board of Directors any fraud that involved company
9 management.

10 [Ex. 1 (Complaint) ¶ 85; Ex. 3 (Tekulve Answer) ¶ 85; Ex. 72 at 00003286 &
11 00003288.] These certifications were false in that the Form 10-K contained
12 material misrepresentations and omissions of material fact regarding Basin's
13 quarterly and annual revenues, and did not fairly represent Basin's financial
14 condition, and Tekulve had not disclosed to either Basin's auditors or its audit
15 committee his and Jensen's fraud in causing the improper revenue recognition in
16 connection with the SPE transactions.

17 (3) **Tekulve Made False And Misleading Statements**
18 **In The 2007 Analyst Conference Call**

19 165. At about 1:30 p.m. Pacific Time on March 17, 2008, Tekulve and
20 Stark participated on behalf of Basin in an analyst conference call, for which
21 Tekulve had edited the script earlier that day. [See Ex. 1 (Complaint) ¶ 86; Ex. 3
22 (Tekulve Answer) ¶ 86.] Among other representations, Tekulve represented that
23 "Our annual revenues were \$18.8 million, an increase of \$1.7 million or 10%
24 growth over the prior year. . . . We also achieved nearly similar levels of system
25 sales as we did in 2006." [Ex. 1 (Complaint) ¶ 86; Ex. 3 (Tekulve Answer) ¶ 86;
26 Ex. 73 (Depo. Ex. 754 (call. Tr.)) at 01642906.] This statement was materially
27 false and misleading because it failed to disclose that 42% of Basin's annual
28 revenues, and 58% of its system sales, were improperly recognized pursuant to the

1 transactions with the SPEs.

2 166. Moreover, when an analyst asked “who is VL Capital? And then,
3 who is Water Services Solutions? Are those metropolitans or municipalities?” the
4 analyst was told VL Capital was “a financing group,” and regarding VL Capital
5 and WSS, “They’re the owners of the assets,” when in fact, the purported
6 transactions with VL and WSS were financed by Basin itself, and VL Capital and
7 WSS in fact did not own the assets. [See Ex. 73 at 01642916.] Finally, when
8 asked about “The issuance of \$3.4 million of notes receivable? What was that in
9 connection with?”, Tekulve responded “That was actually in connection with the V
10 LC transaction. It was a combination – the sale to V LC was a combination of
11 cash and a long term note receivable,” without explaining that the transactions with
12 VL Capital in fact had no economic substance and revenue should not have been
13 recognized from them. [See Ex. 73 at 01642917.]

14 **E. Defendant Jensen Engaged In Insider Trading, Gaining And**
15 **Realized Over \$9 Million From Selling Basin Stock And Taking**
16 **Charitable Tax Deductions Of \$763,345, And Failed To**
17 **Reimburse Basin For His Realized Profits**

18 167. Defendant Jensen sold Basin stock and donated shares of Basin stock
19 to his *alma mater*, MIT, taking charitable tax deductions:

- 20 a. During 2006 and 2007, after becoming aware of material
21 nonpublic information about the true financial condition of
22 Basin described in detail above, while he was CEO, Chairman
23 of the Board and/or a member of the Board, through brokerage
24 accounts he controlled in his own name at Charles Schwab &
25 Co., Inc. (“CS”), and in his and his wife’s names jointly with
26 right of survivorship at Canaccord Adams, Inc. (“CA”). [See
27 Ex. 5 (Jensen Depo.) at 172:18-173:1 (in 2006 and 2007, Jensen
28 had brokerage accounts at CCA and CS).]

b. During 2008, within twelve months of certifying the false Q3 2007 Form 10-Q in his capacity as CEO no November 13, 2007, through a brokerage account at Albert Fried & Company, LLC (“AF”). [See Ex. 5 (Jensen Depo.) at 172:24-173:25 (Jensen had a brokerage account at AF).]

Jensen’s proceeds from these sales and tax deductions are set forth below:

Jensen’s Sales and Gifts of Basin Stock

Date	Sale or Gift	Number of Shares	Price	Proceeds	Account	Tax Deduction
6/26/06	<i>Q1 2006 Form 10-Q filed including improper Opus Trust revenue</i>					
11/14/06	<i>Q3 2006 Form 10-Q filed including improper Thermax revenue</i>					
12/12/06	Sale	50,000	\$6.41	\$320,500	CA	
12/29/06	Gift	5,000				\$35,000
2006 TOTAL		55,000		\$320,500		\$35,000
2/20/07	Sale	57,281	\$8.00	\$458,248	CA	
2/21/07	Sale	42,719	\$8.00	\$341,752	CA	
4/2/07	<i>2006 Form 10-K filed including improper Opus and Thermax Revenue</i>					
7/2/07	Sale	15,400	\$9.00	\$138,600	CA	
7/3/07	Sale	14,951	\$9.01	\$134,709	CA	
7/5/07	Sale	69,649	\$9.03	\$628,930	CA	
7/16/07	Sale	32,110	\$10.00	\$321,100	CA	
7/17/07	Sale	7,890	\$10.00	\$78,900	CA	
7/19/07	Sale	40,000	\$12.72	\$508,800	CA	
8/14/07	<i>Q2 2007 Form 10-Q filed including improper VL revenue</i>					
10/25/07	Gift	85,000				\$371,803
11/14/07	<i>Q3 2007 Form 10-Q filed including improper WSS revenue</i>					

Date	Sale or Gift	Number of Shares	Price	Proceeds	Account	Tax Deduction
2007 TOTAL		365,000		\$2,611,039		\$371,803
3/17/08	<i>2007 Form 10-K filed including improper VL and WSS revenue</i>					
4/10/08	Gift	200,000				\$356,542
5/15/08	Sale	78,129	\$5.01	\$391,426	CA	
5/16/08	Sale	2,607	\$5.00	\$13,035	CA	
5/20/08	Sale	169,264	\$5.00	\$846,320	CA	
6/10/08	Sale	1,092	\$4.20	\$4,586	CS	
6/11/08	Sale	23,908	\$4.20	\$100,414	CS	
6/13/08	Sale	4,100	\$4.25	\$17,425	CS	
6/16/08	Sale	20,900	\$4.25	\$88,825	CS	
6/20/08	Sale	20,000	\$4.39	\$87,800	CS	
6/24/08	Sale	2,696	\$4.50	\$12,132	CS	
6/26/08	Sale	3,968	\$4.50	\$17,856	CS	
6/27/08	Sale	13,336	\$4.50	\$60,012	CS	
7/10/08	Sale	30,000	\$4.43	\$132,900	AF	
7/11/08	Sale	30,000	\$4.32	\$129,600	AF	
7/14/08	Sale	88,000	\$4.34	\$381,920	AF	
7/15/08	Sale	500	\$4.21	\$2,105	AF	
7/17/08	Sale	5,000	\$4.24	\$21,200	AF	
7/18/08	Sale	693	\$4.20	\$2,911	AF	
7/21/08	Sale	81,500	\$4.21	\$343,115	AF	
7/23/08	Sale	500	\$4.20	\$2,100	AF	
7/28/08	Sale	4,000	\$4.00	\$16,000	AF	
7/29/08	Sale	5,100	\$3.94	\$20,094	AF	

Date	Sale or Gift	Number of Shares	Price	Proceeds	Account	Tax Deduction
7/30/08	Sale	6,000	\$3.89	\$23,340	AF	
7/31/08	Sale	15,000	\$3.82	\$57,300	AF	
8/1/08	Sale	12,000	\$3.85	\$46,200	AF	
8/4/08	Sale	9,300	\$3.77	\$35,061	AF	
8/6/08	Sale	20,850	\$3.75	\$78,188	AF	
8/7/08	Sale	882,500	\$3.75	\$3,309,375	AF	
2008 TOTAL		1,730,943		\$6,241,240		\$356,542
GRAND TOTAL		2,150,943		\$9,145,779		\$763,345

[Declaration of Roberto Tercero ¶ 8, 76 (chart); *see also* Ex. 1 (Complaint) ¶ 87; Ex. 2 (Jensen Answer) ¶ 87 (Jensen admits he sold Basin stock from December 12, 2006, through August 7, 2008.)]

168. Jensen entered into his 10b5-1 plan for automatic sale of his Basin stock on December 13, 2006, which plan was effective on December 15, 2006, and which plan expired on January 15, 2008. [Ex. 5 (Jensen Depo.) at 168:12-169:14.] When Jensen entered into the plan, he was aware of the material nonpublic information described in detail above that Basin's revenues were materially overstated for the first and third quarters of 2006 and 2006 year to date, as a result of recognition of revenue on the Opus Trust and Thermax transactions, which he negotiated on behalf of Basin.

169. When Jensen entered into his 10b5-1 plan, he understood that he was only permitted to enter into such a trading plan when he was not in possession of material nonpublic information. [Ex. 5 (Jensen Depo.) at 160:15-160:21.]

170. Jensen has not reimbursed Basin for any of the profits realized from the above sales and gifts of Basin securities.

F. Basin Announced It Intended To Restate Its Financial Statements For Each Of The Relevant Periods, And Its Stock Price Collapsed

171. On August 11, 2008, four days after Jensen made his final sale described above, profiting by over \$3.3 million on that sale alone, Basin issued a press release, announcing that Basin believed “that it may be necessary to restate previously issued financial statements for certain periods as a result of the Company’s revenue recognition relating to certain specific transactions.” [Ex. 1 (Complaint) ¶ 89; Ex. 2 (Jensen Answer) ¶ 89 (Jensen admits that he sold Basin stock on or about August 7, 2008, and that Basin filed a Form 8-K and issued a press release on or about August 7, 2008); Ex. 3 (Tekulve Answer) ¶ 89 (admitting all but trade by Jensen).] Basin also announced that it would not timely file its report on Form 10-Q for the quarter ending June 30, 2008. [*Id.*] Basin further announced that it no longer believed that it would achieve analysts’ revenue estimates and did not intend to provide any further revenue guidance for the year. [*Id.*] On August 11, 2008, Basin also filed its report on Form 8-K regarding the August 11 press release and its contents and attaching a copy of it as an exhibit. [*Id.*]

172. On August 11, 2008, Basin’s stock price closed at \$2.36 per share, down from the previous day’s close of \$3.62, a 35% decline. [Ex. 1 (Complaint) ¶ 90; Ex. 3 (Tekulve Answer) ¶ 90.]

173. On February 10, 2009, Basin filed a restatement on Form 10-K/A (“Restatement”) with the Commission. [Ex. 1 (Complaint) ¶ 91; Ex. 3 (Tekulve Answer) ¶ 91; Ex. 2 (Jensen Answer) ¶ 91 (Jensen admits Basin restated its financials for 2006 and 2007).] The Restatement amended the annual report on Form 10-K for the year ended December 31, 2007, filed with the Commission on March 17, 2008. [Ex. 1 (Complaint) ¶ 91; Ex. 3 (Tekulve Answer) ¶ 91.] The Restatement also included amended and restated consolidated financial statements and related financial information for the years ended December 31, 2006 and 2007, including the financial results in each of the quarterly periods in 2006 and 2007.

[Ex. 1 (Complaint) ¶ 91; Ex. 3 (Tekulve Answer) ¶ 91.] The Restatement contained a list of “significant determinations” including conclusions that

- a. Basin improperly recognized \$1.5 million in revenues with respect to the Opus Trust transaction in Q1 2006. Instead, Basin should have recognized the down payment, “\$0.2 million,” that it received in Q2 2006 “when the transaction documentation was completed and executed” and “the remaining \$1.3 million as revenues upon collection.” [Ex. 12 (Restatement) at 01648603, Item 2, “third transaction.”]
- b. Basin improperly recognized revenues with respect to the Thermax transaction because there was no shipping date for the units purportedly sold, no shipping date ever specified, and the units were never shipped. Basin conceded that Thermax claimed a right of return but also stated that Basin disputed that claim. Basin reversed the revenues “in the amount of \$0.1 million and \$0.6 million in 2007 and 2006, respectively.” [Ex. 12 (Restatement) at 01648603, Item 2, “fourth transaction.”]
- c. Basin improperly recognized revenues on the VL Capital and WSS transactions because “the financial statements of VLC and WSS should be consolidated with those of the Company in accordance with FIN 46(R). This analysis is based on the fact that the structure of the transactions with VLC and WSS did not effectively transfer sufficient risk to the other parties to the transactions, leaving the Company [Basin] with the majority of the risks. In addition, in the transactions with WSS, the contract conditions of the transactions were not fulfilled. As a result, the Company incorrectly recognized revenues from these transactions.” [Ex. 12 (Restatement) at 01648603, Item 1.]

[See also Ex. 1 (Complaint) ¶ 91; Ex. 3 (Tekulve Answer) ¶ 91.]

III. CONCLUSIONS OF LAW

A. Jurisdiction And Venue

1. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1) and 22(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. §§ 77t(b), 77t(d)(1) & 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e), 21A(a)(1)(A) and 27(a) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e), 78u-1(a)(1)(A) & 78aa(a). [Ex. 1 (Complaint) ¶ 1; Ex. 2 (Jensen Answer) ¶ 1 (admitting this Court has jurisdiction).] Defendants have, directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the transactions, acts, practices and courses of business in which they engaged.

2. Venue is proper in this district pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C. § 78aa(a), because the defendants reside in and/or transact business in this district and certain of the transactions, practices, and courses of business constituting violations of the federal securities laws occurred within this district. [See Ex. 1 (Complaint) ¶ 2; Ex. 2 (Jensen Answer) ¶ 2 (admitting venue is proper in this district); Ex. 3 (Tekulve Answer) ¶ 2 (admitting he resides in and/or transacts business in this District).]

B. The Defendants Violated The Antifraud, Issuer Reporting, And Record Keeping Provisions, And Tekulve Additionally Lied To Basin’s Auditors

1. The Defendants Violated The Antifraud Provisions Of Section 17(a) Of The Securities Act

3. The Defendants, by engaging in the conduct described above, directly or indirectly, in the offer or sale of securities by the use of means or instruments of transportation or communication in interstate commerce or by use of the mails:

- a. with scienter, employed devices, schemes, or artifices to defraud;
- b. obtained money or property by means of untrue statements of a material fact or by omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- c. engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

2. The Defendants Violated The Antifraud Provisions Of Section 10(b) Of The Exchange Act And Rule 10b-5 Thereunder, Both As Primary Violators And As Control Persons

4. The Defendants and Basin, by engaging in the conduct described above, directly or indirectly, in connection with the purchase or sale of a security, by the use of means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange, with scienter:

- a. employed devices, schemes, or artifices to defraud;
- b. made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- c. engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon other persons.

5. By engaging in the conduct described above, the defendants violated, and unless restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

6. The Defendants were control persons of Basin because each possessed, directly or indirectly, the power to direct or cause the direction of the

1 management and policies of Basin. Accordingly, pursuant to Section 20(a) of the
2 Exchange Act, 15 U.S.C. § 78t(a), each Defendant is liable to the Commission
3 same extent as Basin would be.

4 **3. Jensen Engaged In Insider Trading**

5 7. Under the “traditional” or “classical” theory of insider trading
6 liability, Section 10(b) and Rule 10b-5 are violated when a corporate insider trades
7 in the securities of his corporation on the basis of material nonpublic information.
8 *United States v. O’Hagan*, 521 U.S. 642, 651-52 (1997). A purchase or sale of
9 securities is made “on the basis of” material nonpublic information “if the person
10 making the purchase or sale was aware of the material nonpublic information when
11 the person made the purchase or sale.” Exchange Act Rule 10b5-1(b), 17 C.F.R. §
12 240.10b5-1(b).

13 8. Here, Jensen was not only aware of the material nonpublic
14 information that Basin’s financial condition was being materially misrepresented to
15 the public – he created and disseminated false information regarding Basin’s
16 financial condition. He then sold large amounts of Basin stock, profiting by
17 millions of dollars.

18 9. Jensen does not have a valid defense that his sales of stock were made
19 pursuant to a 10b5-1 plan, because he entered into his plan December 13, 2006,
20 after the false Q3 2006 10-Q which he certified was filed with the Commission on
21 November 14, 2006. (Facts ¶ 168.)³ That 10-Q included the revenue fraudulently
22 recognized for the Opus Trust and Thermax transactions Jensen had negotiated.
23 Rule 10b5-1(c)(1)(ii). *See SEC v. Mozilo*, 2010 U.S. Dist. LEXIS 98203 * 63-67
24 (C.D. Cal. September 16, 2010).

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28 ³ The plan was entered into one day after Jensen made his sole trade in 2006,
whereby he profited by \$320,000. (See Facts ¶ 167 (chart).) For this threshold
reason, Jensen cannot use the existence of the plan as a defense for his 2006 sale.

1 **4. The Defendants Are Liable For Violations By Basin Of The**
2 **Issuer Reporting Provisions, Both As Aiders And Abettors**
3 **And As Control Persons Of Basin**

4 10. Basin violated Section 13(a) of the Exchange Act, 15 U.S.C. §
5 78m(a), and Rules 12b-20, 13a-1 and 13a-13 thereunder, 17 C.F.R. §§ 240.12b-20,
6 240.13a-1 & 240.13a-13, by filing with the Commission required periodic reports
7 for the first through third quarters of its fiscal years 2006 and 2007, and annual
8 reports for its fiscal years 2006 and 2007 which failed to include material
9 information necessary to make the required statements, in light of the
10 circumstances under which they were made, not misleading.

11 11. The Defendants knowingly provided substantial assistance to Basin's
12 violation of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-
13 13 thereunder.

14 12. By engaging in the conduct described above and pursuant to Section
15 20(e) of the Exchange Act, 15 U.S.C. § 78t(e), the Defendants aided and abetted
16 Basin's violations, and unless restrained and enjoined will continue to aid and abet
17 violations, of Section 13(a) of the Exchange Act, 15 U.S.C. § 78m(a), and Rules
18 12b-20, 13a-1 and 13a-13 thereunder, 17 C.F.R. §§ 240.12b-20, 240.13a-1 &
19 240.13a-13.

20 13. The Defendants were control persons of Basin because each
21 possessed, directly or indirectly, the power to direct or cause the direction of the
22 management and policies of Basin. Accordingly, pursuant to Section 20(a) of the
23 Exchange Act, 15 U.S.C. § 78t(a), each Defendant is liable to the Commission
24 same extent as Basin would be.

25 **5. The Defendants Violated The Record-Keeping Provisions**

26 14. By engaging in the conduct described above, the Defendants violated,
27 and unless restrained and enjoined will continue to violate, Section 13(b)(5) of the
28 Exchange Act, 15 U.S.C. § 78m(b)(5), by knowingly falsifying books, records and

1 accounts issuers are required to make and keep, in reasonable detail, accurately and
2 fairly reflecting the issuer's transactions and dispositions of its assets; and
3 Exchange Act Rule 13b2-1, 17 C.F.R. § 240.13b2-1, by, directly or indirectly,
4 falsifying or causing to be falsified issuer books, records, and accounts.

5 **6. Defendant Tekulve Violated The Prohibition Against**
6 **Making Misrepresentations And Omissions Of Material**
7 **Fact To Auditors**

8 15. Defendant Tekulve, by engaging in the conduct described above,
9 including by signing false management representation letters, and submitting the
10 2006 "Analysis of Bad Debt" memorandum and "white papers" regarding the SPEs
11 to the auditors, and failing to disclose Hansen's history to the auditors, directly or
12 indirectly violated Exchange Act Rule 13b2-2, 17 C.F.R. § 240.13b2-2 by:

- 13 a. making or causing to be made materially false or misleading
14 statements to accountants in connection with; or
15 b. omitting to state, or caused another person to omit to state,
16 material facts necessary in order to make statements made, in
17 light of the circumstances under which such statements were
18 made, not misleading, to accountants in connection with:
19 i. an audit, review or examination of the financial
20 statements of the issuer required to be made; or
21 ii. the preparation or filing of a document or report required
22 to be filed with the Commission.

23 **7. The Defendants Falsely Certified Basin's Forms 10-K And**
24 **10-Q**

25 16. The Defendants, by engaging in the conduct described above, violated
26 Exchange Act Rule 13a-14, 17 C.F.R. § 240.13a-14, by falsely certifying, among
27 other things, that Basin's 2006 and 2007 Forms 10-Q and 10-K fully complied
28 with the requirements of the Exchange Act and fairly presented, in all material

1 respects, the financial condition and results of operations of the company, when, in
2 fact, the reports contained untrue statements of material fact and omitted material
3 information necessary to make the reports not misleading.

4 **8. The Defendants Failed To Reimburse Basin For Any Bonus**
5 **Or Other Incentive-Based Or Equity Based Compensation**
6 **Received From Basin In Violation Of Section 304 Of The**
7 **Sarbanes-Oxley Act**

8 17. The Defendants, by engaging in the conduct described above, failed to
9 reimburse the issuer, Basin, for any bonus or other incentive based or equity-based
10 compensation received by them from Basin during the twelve-month period
11 following each of the public filings of the Forms 10-K and 10-Q alleged herein,
12 which filings required restatement due to the material noncompliance of Basin, as a
13 result of misconduct, with financial reporting requirements under the securities laws.

14 18. Defendant Jensen, by engaging in the conduct described above, failed
15 to reimburse the issuer, Basin, for any profits realized from the sale of Basin
16 securities during the twelve-month period following each of the public filings of
17 the Forms 10-K and 10-Q alleged herein, which filings required restatement due to
18 the material noncompliance of Basin, as a result of misconduct, with financial
19 reporting requirements under the securities laws.

20 19. By engaging in the conduct described above, the Defendants violated
21 Section 304(a)(1) of the Sarbanes-Oxley Act, 15 U.S.C. § 7243(a)(1), and
22 defendant Jensen violated Section 304(a)(2) of the Sarbanes-Oxley Act, 15 U.S.C.
23 § 7243(a)(2).

24 **C. The Commission Is Entitled To Relief**

25 **1. The Commission Is Entitled To Permanent Injunctive Relief**

26 20. To obtain an injunction, the Commission must establish that there is a
27 reasonable likelihood of future violations. *See SEC v. Murphy*, 626 F.2d 633, 655
28 (9th Cir. 1980). Whether a likelihood of future violations exists depends upon the

1 totality of the circumstances. *Id.* The existence of past violations may give rise to
2 an inference that there will be future violations. *See id.* Courts also consider
3 factors such as the degree of scienter involved, the isolated or recurrent nature of
4 the violative conduct, the defendant's recognition of the wrongful nature of the
5 conduct, the likelihood that, because of the defendant's occupation, future
6 violations may occur, and the sincerity of defendant's assurances (if any) against
7 future violations. *SEC v. Murphy*, 626 F.2d at 655. Because all of the above
8 factors are present, permanent injunctions are appropriate.

9 **2. Disgorgement Should Be Ordered**

10 21. Disgorgement is designed to deprive a wrongdoer of unjust
11 enrichment, and to deter others from violating securities laws by making violations
12 unprofitable; a district court has broad equity powers to order the disgorgement of
13 ill-gotten gains obtained through violation of the securities laws. *SEC v. Platforms*
14 *Wireless*, 617 F.3d 1072, 1096 (9th Cir. 2010); *SEC v. First Pacific Bancorp*, 142
15 F.3d 1186, 1191 (9th Cir. 1998). "The amount of disgorgement should include all
16 gains flowing from the illegal activities." *See SEC v. Platforms Wireless*, 617 F.3d
17 at 1096, *quoting SEC v. JT Wallenbrock*, 440 F.3d 1109, 1114 (9th Cir. 2006).

18 22. The Commission need only present evidence of a "reasonable
19 approximation" of the defendant's ill-gotten gains. *See SEC v. Platforms Wireless*,
20 617 F.3d at 1096; *SEC v. JT Wallenbrock*, 440 F.3d at 1113-14. The burden then
21 shifts to the defendant to "demonstrate that the disgorgement figure was not a
22 reasonable approximation." *SEC v. Platforms Wireless*, 617 F.3d at 1096, *quoting*
23 *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

24 23. In this case, the Commission seeks disgorgement of salaries, bonuses
25 and stock compensation, and with respect to Jensen, his insider trading profits for
26 2006 and 2007 and a reasonable approximation of his tax deductions. These
27 amounts total \$3,771,214 for Jensen and \$721,424 for Tekulve. (Tercero
28 Declaration ¶ 93.)

24. Additionally, disgorgement normally includes prejudgment interest to insure that wrongdoers do not profit from their illegal conduct, which may be calculated based on the rate provided in 26 U.S.C. § 6621 for tax underpayments. *SEC v. Platforms Wireless*, 617 F.3d at 1099. Jensen and Tekulve thus owe \$856,033.59 and \$152,078.52 respectively in prejudgment interest. (Tercero Declaration ¶ 95.)

3. Reimbursement Should Be Ordered

25. SOX Section 304, 15 U.S.C. § 7243 provides that:

If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for –

(1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever occurs first) of the financial document embodying such financial reporting requirement; and

(2) any profits realized from the sale of securities of the issuer during that 12-month period.

Section 304 does not require personal misconduct by the CEO or CFO; it merely requires misconduct by the issuer, Basin. *See SEC v. Jenkins*, 2010 U.S. Dist. LEXIS 57023 * 6-8 (D. Az. 2010). As explained, Basin's financial statements were repeatedly and materially misstated, as a result of violations of very basic GAAP provisions governing revenue recognition. This resulted in restatement of Basin's 2006 and 2007 financial statements. (Facts ¶ 173.) The Defendants should accordingly be required to disgorge as reimbursement their equity-based compensation and bonuses; Jensen should further be ordered to reimburse his trading profits, including from 2008. Jensen should reimburse \$9,533,617;

1 Tekulve should reimburse \$396,280. (Tercero Declaration ¶ 93.)

2 **4. Remedies Act Civil Penalties Should Be Imposed**

3 26. If the violation “involved fraud, deceit, manipulation, or deliberate or
4 reckless disregard of a regulatory requirement” and “such violation directly or
5 indirectly resulted in substantial losses or created a significant risk of substantial
6 losses to other persons” a third tier penalty may be imposed. *See* Section
7 21(d)(3)(B)(iii) of the Exchange Act, 15 U.S.C. § 78u(d)(3)(B)(iii). Plaintiff
8 Commission recommends that two \$130,000 maximum third tier civil money
9 penalties totaling \$260,000 be imposed against each Defendant representing two
10 violations.⁴ The assessment of a penalty in this amount is appropriate because
11 these Defendants not only violated the antifraud provisions, but their conduct
12 directly or indirectly created a risk of substantial losses to other persons, as
13 evidenced by the dramatic 35% drop in share price following the announcement
14 that Basin might have to restate its revenues. (Facts ¶ 171.)

15 27. The proposed penalties reflect, in the case of Jensen, his involvement
16 in the Benowitz and Thermax transactions. In the case of Tekulve, a double
17 penalty is appropriate in light of his continued involvement in the fraudulent
18 scheme for a period of two years.

19 28. The factors used to determine the appropriateness of an injunction are
20 helpful when assessing penalties. *SEC v. Abacus International Holding Corp.*,
21 [2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,542, 2001 U.S. Dist. LEXIS
22 12635, 2001 WL 940913, *5 (N.D. Cal. August 16, 2001). Evaluation of these

23
24
25 ⁴ The statutory amounts found in the Exchange Act have been amended by the
26 Debt Collection Improvement Act of 1996, Pub L. No. 104-134, Section 31001(s),
27 April 26, 1996. The amendments authorize the Commission to adjust the civil
28 penalties for inflation by rulemaking. The Commission has done so. *See* 17
C.F.R. §§ 201.1003 & 201.1004 & Tables III & IV (2011). For conduct occurring
subsequent to February 14, 2005, but prior to March 3, 2009, the third tier imposes
maximum limits for each violation of the greater of \$130,000 for natural persons
respectively, or the “gross amount of pecuniary gain” to the defendant, rather than
the \$100,000 set forth in the statute. (*Id.*)

factors indicates that imposition of the requested \$260,000 penalties against each defendant is appropriate.

5. Jensen Should Be Ordered To Pay A Triple ITSA Penalty

29. In addition to Remedies Act penalties for his financial fraud, Jensen should be ordered to pay penalties under the Insider Trading Sanctions Act (“ITSA”). Section 21A(a)(1)(A) of the Exchange Act, 15 U.S.C. § 78u-1(a)(1)(A), provides that the Court has jurisdiction to impose a civil penalty of up to “three times the profit gained . . . as a result of such unlawful . . . sale.” 17 U.S.C. § 78u-1(a)(1)(A)(2). Here, Jensen created a false picture of the company’s finances, negotiating the Opus and Thermax deals for which it was clear little, if any, revenue would flow to Basin; he nevertheless caused \$2 million in revenue to be recognized on these transactions, disseminated that false revenue information to the public, and benefited significantly from selling Basin shares while the true financial information remained nonpublic. The Commission seeks a triple ITSA penalty on Jensen’s trades in 2006 and 2007, made before he signed and certified his final Basin filing with the Commission, the Q2 Form 10-Q on November 14, 2007, and before he left his position as Basin CEO on February 19, 2008. (*See* Facts ¶¶ 1 & 167(chart).) Jensen’s profits gained in 2006 and 2007 totaled \$2,845,034. A triple ITSA penalty would total \$8,535,102.

6. Permanent Officer And Director Bars Are Appropriate

30. The Court is authorized to prohibit any person who violates Section 10(b) from acting as an officer or director of any public company if the person’s conduct demonstrates unfitness to serve as an officer or director. *See* Section 21(d)(2) of the Exchange Act, 15 U.S.C. § 78u(d)(2). Previously, the statute required proof of “substantial unfitness,” in 2002 Congress lowered the Commission’s burden, merely requiring it to establish the defendant’s “unfitness.” *See SEC v. Indigenous Global Development Corp.*, 2008 U.S. Dist. LEXIS 50434 at ** 53-54. Under the older, more stringent standard, the Ninth Circuit held that,

1 in determining whether to order such a bar, a court may consider: (1) the
2 egregiousness of the underlying violation; (2) the defendant's "repeat offender"
3 status; (3) the defendant's role or position when he engaged in the fraud; (4) the
4 defendant's degree of scienter; (5) the defendant's economic stake in the violation;
5 and (6) the likelihood that misconduct will recur. *SEC v. First Pacific Bancorp*,
6 142 F.3d at 1193 (upholding permanent bar). Each of these factors favors
7 imposition of a permanent bar against both defendants.

8
9 DATED:

10 HONORABLE MANUEL L. REAL
11 UNITED STATES DISTRICT JUDGE
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PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

[X] U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648

Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On July 23, 2012, I caused to be served the document entitled **[PROPOSED] STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW BY PLAINTIFF SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT THOMAS C. TEKULVE, JR., AND FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT PETER L. JENSEN** on all the parties to this action addressed as stated on the attached service list:

[] **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

[] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

[] **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

[] **HAND DELIVERY:** I caused to be hand delivered each such document to the office of the addressee as stated on the attached service list.

[] **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

[] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

[X] **E-FILED:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

[] **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 23, 2012

/s/ Karen Matteson
Karen Matteson

SEC v. Peter L. Jensen, et al.
United States District Court – Central District of California
Case No. CV 11-05316 R (AGRx)
(LA-3478)

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